

(26,099)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 632.

TEXAS AND PACIFIC RAILWAY COMPANY AND MISSOURI, KANSAS AND TEXAS RAILWAY OF TEXAS,
PETITIONERS,

vs.

B. LEATHERWOOD.

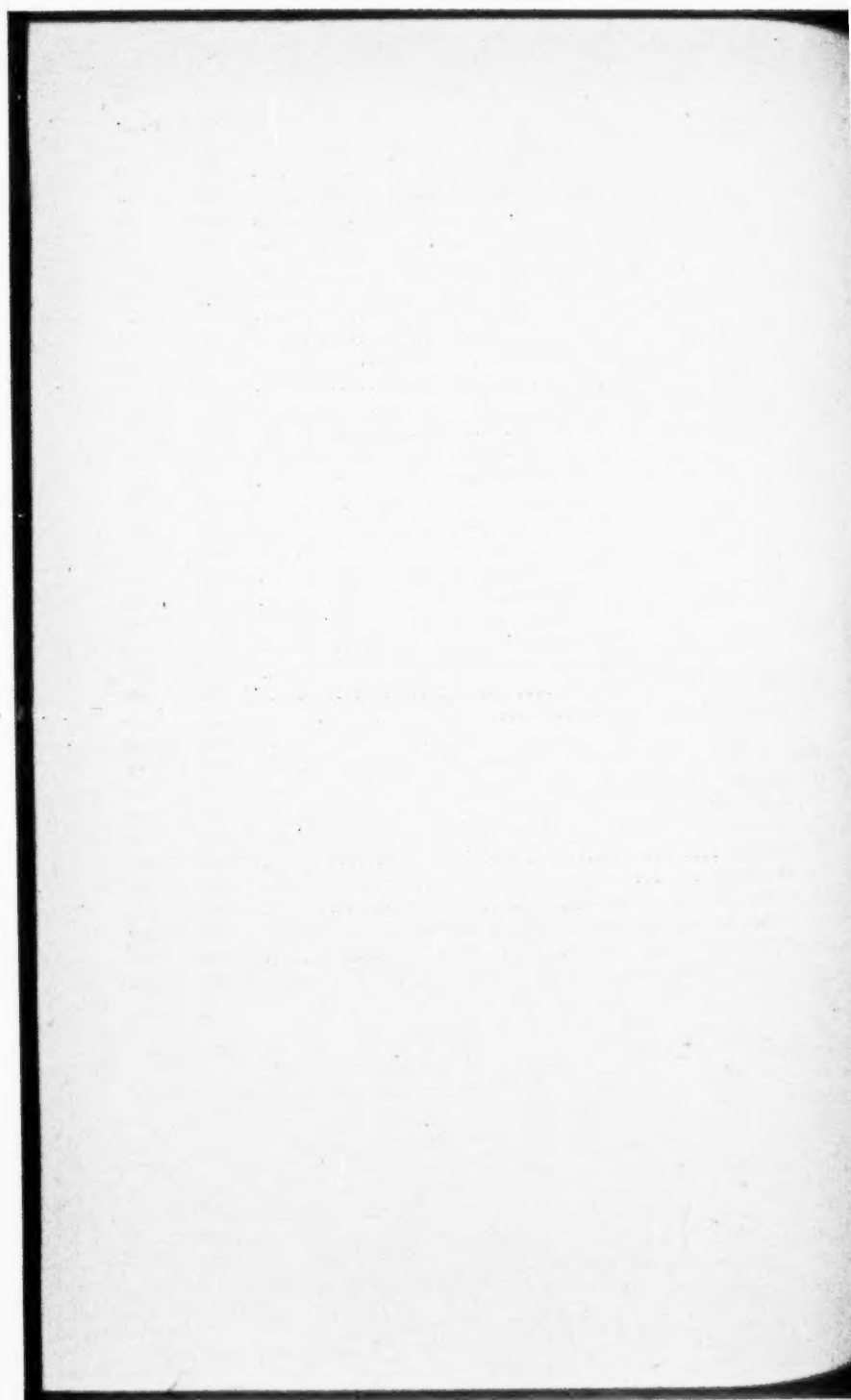
ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF
CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT
OF THE STATE OF TEXAS.

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1

Caption.

THE STATE OF TEXAS,
County of Tarrant:

Caption.

At a term of the County Court of Tarrant County, for Civil Cases, begun and holden within and for said County of Tarrant, at Fort Worth, in the State of Texas, on the first Monday in November, A. D. 1915, and which adjourned on the 1st day of January, A. D. 1916, the Honorable Charles T. Prewett, Judge of said Court, presiding, the following cause came on for trial, to-wit:

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RAILWAY COMPANY et al.

2

Plaintiff's Original Petition.

March 2, 1915.

THE STATE OF TEXAS,
County of Tarrant:

In the County Court of Tarrant County for Civil Cases, to May Term, 1915.

To Hon. Court:

Comes B. Leatherwood, hereinafter styled plaintiff, and complains of The Texas & Pacific Railway Company, a railway company duly incorporated under the laws of the United States; the Atchison, Topeka & Santa Fe Railway Company, a railway company duly incorporated under the laws of the State of Kansas and Missouri; the Missouri, Kansas and Texas Ry. Company of Texas, a railway company duly incorporated under the laws of the State of Texas; the Rio Grande, El Paso & Santa Fe Railway Company, formerly the Rio Grande & El Paso Railway Company, a corporation, duly incorporated under the laws of the State of Texas.

II.

Plaintiff represents that all said railroads are engaged in operating railway lines in and through the states of New Mexico and

Texas, and together as connecting carriers operate a line of railways from Watrous, New Mexico to Waco, Texas, hauling and transporting passengers and live stock and other commodities for the public for hire, and are common carriers; that is, the Atchison, Topeka & Santa Fe Railway Company and the then Rio Grande and El Paso

3 Railway Company, but now the Rio Grande, El Paso & Santa Fe Ry. company, both together, and as agents of each other, and as partners, were operating such a line of railway from Watrous, New Mexico to El Paso, Texas; the Texas & Pacific Railway Company operated and now operates such a line from El Paso, Texas to Cisco, Texas, and to Fort Worth, Texas; and the said Missouri, Kansas & Texas Railway Company of Texas operated then and now such a railway line from said Cisco, Texas, and also from Fort Worth, Texas to Waco, Texas.

III.

Plaintiff represents that he resides in and near Watrous, N. M.; that defendants, The Texas & Pacific Railway Company, and the Missouri, Kansas & Texas Railway Company of Texas, have general offices and local agents in Fort Worth, Tarrant County, Texas; and defendant, Atchison, Topeka & Santa Fe Railway Company is a foreign corporation, except for its connection and partnership, as alleged, with the said Rio Grande, El Paso & Santa Fe Railway Company, and has a general manager, to-wit; F. C. Fox, an assistant General Manager, to-wit: E. A. Goeldner, a Gen. Supt., to-wit: T. H. Sears, at Amarillo, Potter County, Texas, and Rio Grande, El Paso & Santa Fe Railway Company has local agents at El Paso, Texas.

IV.

Plaintiff represents that about October 9, 1913, he delivered to defendants Rio Grande & El Paso Ry. Co., now Rio Grande, El Paso & Santa Fe Railway Co., and its principal and partner, 4 the Atchison, Topeka & Santa Fe Ry. Company, at Watrous, New Mexico, a certain shipment of about thirty two horses and mares and colts to be transported from said Watrous, N. M. to Waco, Texas; that said defendants, Rio Grande & El Paso Railway Company and its principal and partner, the Atchison, Topeka & Santa Fe Railway Company, then and there accepted said horses, mares and colts, and agreed and contracted to convey and transport, water and feed said animals from said Watrous, N. M. to Waco, Texas, with reasonable care, dispatch and protection; and it further became and was the duty of said defendants so to transport, water and feed said animals; that said defendants routed shipment over the lines of railway of the said defendants, the Texas & Pacific Railway Company and the said Missouri, Kansas & Texas Railway Company of Texas, delivered same to the last named railway lines, and the said last named railway companies accepted same, and agreed to transport and convey, feed and water said animals, with care

and dispatch and safety over its said lines of railway, and it became the duty of all of said railway companies to so transport same, and properly feed and water same, and furnish feed and water for same.

V.

Plaintiff represents that all of said defendants were very negligent and careless in the handling of said animals, and handled same roughly, jerking and injuring same; that they failed and refused to water and feed, or furnish food of any kind, or to furnish water to said animals, en route for 43 hours at a time; that one of the cars containing said animals was so negligently constructed and in such improper care and condition that one of said mares got her foot in through same, greatly injuring her; that five of said animals were crippled, four others were badly hurt, and all of said animals suffered great damage from want of water and proper care, and plaintiff was forced to sell said animals at Waco at a great and heavy loss, to-wit: Four Hundred Dollars.

VI.

That soon after said damage occurred, plaintiff presented said defendants his claim for \$200.00, damage, one-half of the true amount, offering to settle for that amount; that defendants, after keeping said claim for a long time rejected it.

VII.

Wherefore, premises considered, plaintiff prays that all said defendants be cited to answer this suit, and that upon trial he have judgment for \$400, 6% interest from Oct. 9, 1913, and \$20 attorney's fee, all costs herein that plaintiff may be entitled to at law or in equity.

TEMPLETON, MILAM & WRIGHT,
Attorneys for Plaintiff.

Filed March 2, 1915. W. H. Logan, County Clerk.

6

Original Answer of Defendants.

May 4, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Comes now the Texas & Pacific Railway Company, a corporation, and the Missouri, Kansas & Texas Railway Company of Texas,

a corporation, defendants in the above entitled cause, and with respect to plaintiff's original petition filed herein on March 2nd, 1915, say:

1.

They demur to say petition and say that same is insufficient in law, and that it states no cause of action against these defendants, and of this they pray judgment of the Court.

2.

With respect to allegations contained in paragraph 2 of said petition, in so far as they affect them, these defendants admit same.

3.

With respect to the allegations contained in paragraph 3 of said petition, in so far as they effect these defendants, said allegations are admitted.

4.

With respect to the allegations contained in paragraph 4 of said petition relative to plaintiff delivering a certain number of
7 horses and colts at Watrous, New Mexico, and relative to certain contract made by the other defendants in this case; these defendants herein say that they have no knowledge or information sufficient to form a belief, and they are unable to deny or affirm said allegations.

With respect to the further allegations contained in said paragraph to the effect that these defendants accepted plaintiff's shipment and agreed to transport and convey the animals therein, feeding and watering them, with care and dispatch and safety over their lines of railway, and to the further fact that it was the duty of these defendants to transport same and properly feed and water same, and furnish feed and water for same, these defendants expressly deny same.

5.

With respect to the allegations contained in paragraph 5 of said petition, in so far as they effect them, these defendants expressly deny same.

6.

With respect to the allegations contained in paragraph 6 of said petition, in so far as they effect them, these defendants expressly deny same, and say that at no time did plaintiff deliver to either one of them, or both of them, notice of his alleged damage on this shipment.

8 Wherefore, this defendant prays that judgment be entered in its favor, and that it go hence without day and recover its costs of plaintiff.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,
Attorneys for Defendants.

Now comes George Thompson, Jr., who having been first duly sworn, upon oath states that he is one of the attorneys for the defendant in the above entitled cause, and that he has read the foregoing answer, and that he believes the statements therein contained to be true and correct.

Subscribed and sworn to before me by George Thompson, Jr., on this the — day of April, 1915.

Notary Public for Tarrant County, Texas.

Filed May 4, 1915. W. H. Logan, County Clerk.

9 *Answer of Defts. A., T. & S. F. Ry. Co.; R. G., E. P. & S. F. Ry. Company.*

Sept. 8, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Now come the Atchison, Topeka & Santa Fe Railway Company and the Rio Grande, El Paso & Santa Fe Railway Company, defendants in the above styled and numbered cause, and except generally to plaintiff's petition on file herein, and say that said petition is wholly insufficient in law, and states no cause of action against these defendants, and of this they pray the judgment of the Court.

LEE, LOMAX & SMITH,
Attorneys for Defendants.

For answer herein, should the same be required, these defendants deny all and singular the allegations in plaintiff's said petition contained, and demand strict proof of same, and of this they put themselves upon the Count-y.

LEE, LOMAX & SMITH,
Attorneys for Defendants.

Filed September 8, 1915. W. H. Logan, County Clerk.

10

Plaintiff's First Amended Petition.

Dec. 21, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RAILWAY Co. et al.

To said Honorable Court:

Comes now your petitioner, B. Leatherwood, plaintiff, and leave of the Court being first had, files this his first amended original petition amending his original petition filed herein on the 2nd day of March, 1915, and for such amendment he pleads as follows, to-wit:

First.

Plaintiff resides in Gaudalupe County, New Mexico; the Atchinson, Topeka and Santa Fe Railway Company is a corporation duly incorporated under the laws of the States of Illinois, Missouri and Kansas as a common carrier of freights and passengers. The Rio Grande, El Paso and Santa Fe Railway Company heretofore known designated and operated under the name of the Rio Grande and El Paso Railway Company, is a corporation duly incorporated under the laws of the State of Texas as a common carrier of freights and passengers. Said defendants *were* now and ever have been agents and partners each of the other, and the defendant last named is now and it ever has been owned, controlled, and its properties have been operated by the defendant first above named as a part of what is

known as the Santa Fe System. Said two defendants now own
11 and operate, and for many years they have owned and operated, as agents and partners, and as a part of said Santa Fe System, a line of railway extending through the Station of Watrous, New Mexico, thence Southward to and into the City of El Paso, where said companies each have an office and agent, and where said line of railway connects with a line of railway owned and operated by the defendant, Texas and Pacific Railway Company—said two companies first above named are for convenience hereinafter designated as the Santa Fe Companies. The defendant Texas and Pacific Railway Company, hereinafter designated as the T. and P. Company, is a corporation duly incorporated under the laws of the State of Texas as a common carrier. Said defendant owns and operates, and for many years it has owned and operated a line of railway extending from the City of El Paso Eastward to the City of Fort Worth, in Tarrant County, Texas, where said company has an office and local

agent, and where said line of railway connects with a line of railway owned and operated by the defendant Missouri, Kansas & Texas Railway Company of Texas, hereinafter designated as the Katy Company. Said defendant is a corporation duly incorporated under the laws of the State of Texas as a common carrier, and it has an office and Local agent in Tarrant County, Texas. Heretofore on the 9th day of October, 1913, said defendants were engaged in operating their said several lines of railway as connecting carriers between all stations on said lines, including the stations of Watrous, New Mexico, and Waco, Texas, via and through said cities of El Paso and Fort Worth.

Second.

For cause of action plaintiff pleads the following facts, to-wit:

On, to-wit: the 9th day of October, 1913, plaintiff delivered to the defendants Santa Fe Companies, at Watrous, New Mexico, for transportation over said lines of railway to Waco, Texas, a car load of horses consisting of thirty-two head of mares, geldings, etc., which stock said defendants then and there accepted for shipment to their destination. It then and there became and it was the duty of said defendants to exercise ordinary care to furnish a safe and suitable car wherein to load and transport said stock, and to transport same with ordinary care and dispatch to the City of El Paso, and to there deliver same with like care and dispatch to their connecting carriers the T. & P. Co.; It also became and was the duty of said last named company upon receipt of said stock to exercise ordinary care to furnish a safe and suitable car in which to transport same, and to exercise like care and caution to transport such stock with promptness and dispatch over its lines of railway to Fort Worth and to there deliver said horses to its connecting carrier, the Katy Company, for transportation to their destination. It was also the duty of said last named defendant, upon receiving said stock, to exercise ordinary care and caution to transport same over its line of railway with promptness and dispatch to their destination. It was also the duty of said several defendants to exercise ordinary care to properly feed and water said horses while they were in transit over said several lines of railway. Said stock were in good condition for shipment when they were delivered to and accepted by said defendant-, Santa Fe Companies at Watrous, New Mexico, and if said defendants had discharged their duties in transporting them, they would have reached their destination in good condition, on to-wit: the forenoon of October 13th, 1913, when and where said horses could and would have been sold for a good price. Yet so to handle and transport said horses, said defendants negligently failed and refused, and they were guilty of negligence in the following particulars to-wit: Said horses were transported from Watrous to El Paso without any unusual delays, or ill treatment on this part of the journey, and they were sufficiently watered and fed while in transit over the Santa Fe Lines—they reached El Paso at about 3 o'clock A. M. on October 11th, 1913, and

they were then and there promptly transferred by the Santa Fe Companies to the T. & P. Company in fairly good condition. Said defendant last named after receiving said stock caused same to be unloaded, watered, rested and fed at said station and during the night of October 12th, this defendant caused said stock to be reloaded into an unsafe and unsuitable car furnished by it, and the train conveying said stock left said station at about 2 o'clock A. M. October

14 12th, 1913. Said defendant negligently gave said stock a very slow run from El Paso to Big Spring, which place they reached, and where they were unloaded for rest, feed and water at about the hour of about 11 o'clock P. M. on said day. On the run from El Paso to Big Spring, the train and car, carrying said horses *was* negligently and carelessly handled with great force and violence, and such trains were frequently stopped and started with great force and violence, by reason whereof said horses were greatly bruised, crippled and injured as set out below. Said defendant, negligently furnished for the transportation of these horses a defective car, and by reason of the defects in said car and the rough handling of same, one of said horses, a mare, got her foot caught in a hold in said car and she was thus greatly bruised, crippled and injured; as a result of the negligence of said defendant-, five head of said horses were crippled and injured to such an extent as to render them almost worthless. This plaintiff does not know and he cannot state just where such injuries occurred, nor can he state the cause of same more fully than he has done, but all such facts are well known to defendants. Said horses were reloaded at Big Spring for further transportation about 9 o'clock P. M. October 13th, 1913. If defendant-T. & P. Company and Katy Company had exercised ordinary care to handle and transport said horses from Big Spring to Waco, they would have reached their destination within about 24 hours from the time they were reloaded at Big Spring and it would have

15 been unnecessary to have again unloaded and fed them en route, yet so to do said defendants negligently and carelessly failed and refused. Instead of so doing, they gave said horses a very slow run, and negligently kept them confined in the car without food and water, and with no opportunity to rest for a continuous period of about 43 hours, whereby said horses were greatly injured and damaged and depreciated in value. The horses reached Waco and were unloaded there sometime during the afternoon or night of October 15, 1913, in very poor condition. Said defendants negligently failed to provide any facilities, and to afford plaintiff any opportunity to unload, feed and rest said horses on the run from Big Spring to Waco; the trains carrying said horses on this part of their journey were given a very slow run, and the horses were often negligently laid out and held on sidings for long periods of time; said trains were also frequently and negligently stopped, started and handled with great force and violence, whereby said stock was greatly injured and damaged. Plaintiff cannot state the cause of such delays, nor the places where same occurred more fully than he has done, but all such facts are well known to defendants. Because of such negligence on the part of defendants, said horses were injured, damaged and de-

preciated in value as follows, to-wit: Five head crippled and seriously injured to the extent of Fifty Dollars per head, aggregating 16 Two Hundred and Fifty Dollars; twenty-seven head depreciated in value to the extent of Ten Dollars per head, aggregating Two Hundred and Seventy Dollars, total for all, \$520.00, for which, with legal interest, plaintiff sues.

Third.

Wherefore, plaintiff prays that defendants be required to take notice of this plea, and on final hearing hereof he prays for judgment for his said damages, with legal interest thereon, and for all costs of suit, and for relief, general and special, and so will he ever pray.

TEMPLETON & MILAM AND
C. A. WRIGHT,

Attorneys for Plaintiff.

Filed Dec. 21, 1915. W. H. Logan, County Clerk.

17 *Defts. T. & P. and M., K. & T. First Amended Original Answer.*

Dec. 31, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RAILROAD Co. et al.

Come now the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, defendants in the above entitled and numbered cause, and, leave of Court being first had and obtained, file this *this* first amended original answer in lieu of and amending their original answer filed herein on May 4, 1915, and in reply to the allegations of plaintiff's first amended original petition filed herein on the 20th day of December, A. D. 1915, these defendants say:

1.

They demur generally to the said petition of plaintiff, and say the same is wholly insufficient in law, and they — it states no cause of action against them, and of this they pray judgment of the Court.

2.

These defendants specially except, and enter this, their special exception No. 1, to that part of paragraph No. 2 of plaintiff's said

amended petition reading as follows: "Said stock were in good condition for shipment when they were delivered to and accepted by the said Santa Fe Companies at Watrous, and if said defendants
18 had discharged their duties in transporting them, they would have reached their destination in good condition on, to-wit: the afternoon of October 14, 1913, when and where said horses could have and would have been sold for a good price. Yet, so to handle and transport said horses defendants negligently failed and refused, and they were guilty of negligence in the following particulars, to-wit: * * * During the night of October 12, this defendant (T. & P. Ry. Co.) caused said stock to be reloaded into an unsafe and unsuitable car furnished by it * * * said defendant negligently furnished for the transportation of these horses a defective car, and by reason of the defects in said car, and the rough handling of same, one of the said horses, a mare, got her foot caught in a hole in said car and she was greatly bruised and crippled and injured."

These defendants except to the above allegations as contained in said petition of the plaintiff, for the reason that it is undisputed in this case that the shipper's agent accompanied the shipment of horses from Watrous, New Mexico, to Waco, Texas, and was on the train and car at the time it was handled by all of the defendants, and knows full well the manner in which the train and trains were handled en route, and knows in what manner the car referred to was unsuitable and defective. These defendants, therefore, say that the allegations, as quoted above, are too vague and indefinite and too general to apprise the defendants as to the grounds or ground of negligence upon which the plaintiff relies, and on account of
19 the vagueness and indefiniteness of such allegations these defendants are and will be unable to adduce proof at the trial to sufficiently rebut said allegations, and they, therefore, pray judgment of the Court.

3.

These defendants specially except, and enter this their special exception No. 2 to that part of paragraph No. 2 of the plaintiff's said petition which reads as follows: "By reason of the defects in said car and the rough handling of same, one of the horses, a mare, got her foot caught in a hole in said car, and she was thus greatly bruised, crippled and injured * * * and as a result of such negligence of said defendants five head of said horses were crippled and injured to such an extent as to render them almost worthless."

Defendants herein except to the above quoted allegations in plaintiff's said petition for the reason that they are too vague, indefinite and general in that it is undisputed that the plaintiff's agent accompanied the shipment of stock from the point of origin to the point of destination, and, therefore, it is incumbent upon the plaintiff, being in possession of all the facts, to state in his allegations in what respects the injuries complained of were inflicted in order to allow these defendants an opportunity to adduce proof to rebut

said allegations on the trial of the case, and upon this exception these defendants pray judgment of the Court.

20

4.

These defendants specially except, and enter this their special exception No. 3, to that part of paragraph two of plaintiff's said petition, reading as follows: "Instead of so doing they gave said horses a very slow run, and negligently kept them confined in the car without feed and water and with no opportunity to rest for a continuous period of about forty-three hours, whereby said horses were greatly injured and damaged and depreciated in value * * * The trains carrying said horses on this part of their journey were given a very slow run, and the horses were often negligently laid out and held on sidings for a long period of time, and said trains were also frequently stopped, started and handled with great force and violence, whereby said stock were greatly damaged and injured."

These defendants except to the above quoted allegations for the reason that same are too vague and general, in that it is undisputed that the plaintiff's agent accompanied this shipment of horses from the point of origin to their destination and knows full well the manner of handling given them and the trains upon which they were handled, and this being true, it is incumbent upon the plaintiff to plead and allege specifically instead of vaguely and generally as he has done, in order to allow these defendants an opportunity to adduce testimony at the trial to rebut such allegations, and upon these exceptions these defendants pray judgment of the Court.

21

5.

For further answer herein, these defendants deny all and singular each and every allegation in plaintiff's said petition contained, and demand strict proof thereof.

6.

For further and special answer herein, if so required, these defendants say that the shipment of horses involved in this suit, and on account of which damages are sought to be recovered, was an interstate shipment, and as such was and is subject to the laws of the United States governing interstate commerce, in that said horses, as is disclosed by the plaintiff's petition filed herein, were tendered to the initial carrier, the Atchison, Topeka & Santa Fe Railway Company at Watrous, New Mexico, for transportation to Waco, Texas, (from a point in one State of the United States to a point in another State of the United States). In bar of the plaintiff's right of recovery herein against these defendants, or any one of them, these defendants plead that on or about October 9, 1913, the plaintiff herein, B. Leatherwood, and the initial carrier, The Atchison, Topeka & Santa Fe Railway Company, at Watrous, New Mexico,

at the time the said horses were delivered for shipment to the said Atchison, Topeka & Santa Fe Railway Company by the plaintiff, and before the said horses were loaded on to the car for shipment, entered into and executed a written contract covering the shipment of said horses, which contract the plaintiff alleged in
22 his petition filed herein covered the handling of the plaintiff's horses from Watrous, New Mexico to Waco, Texas. Said contract so made and executed among other provisions therein contained, contained the following provision:

"It is further provided that no suit or action against the company for recovery of any damages accruing or arising out of said shipment or any contract pertaining to the same, or the furnishing of facilities for such shipment, shall be sustained in any Court of law or equity unless such suit or action shall be commenced within six months next after the loss or damages shall have accrued. The failure to institute any suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit."

These defendants allege that the shipment involved in this suit was made on October 9, 1913, and that the plaintiff's suit to recover damages against these defendants arising out of the said shipment of said horses was not filed until the 2nd day of March, 1915, at which said time more than six months had elapsed since the date of said shipment and the accrual of such damages, the time allowed under the contract within which to bring suit for the recovery of such damages arising out of said shipment, as provided
23 for by the terms and provisions of said contract as hereinbefore quoted, and which provision these defendants allege is a reasonable provision as a matter of law.

Wherefore, by reason of the failure of the plaintiff to comply with the provision of said contract, hereinbefore quoted, which the plaintiff willingly and voluntarily signed and entered into, and by reason of the failure of the plaintiff to file his suit for damages arising out of the said shipment of horses, within the six months' period after the accrual of said damages, which the plaintiff alleges in his petition was in October, 1913, these defendants here and now plead said provision of said contract as hereinbefore quoted, and the said plaintiff's failure to comply therewith, in bar of the plaintiff's right of recovery herein, and pray judgment of the Court thereon.

7.

By way of still further and special answer herein, if so required, these defendants plead as a bar to the plaintiff's right of recovery herein against them, or either of them, for any damages which the plaintiff alleges his horses may have suffered by reason of their being held and delayed without feed, water and rest en route, the following facts:

These defendants allege that one of the provisions of the contract made and entered into, and which is described in the next

24 preceding paragraph herein covering the transportation of said shipment of horses from Watrous, New Mexico, the point of origin, to Waco, Texas, the point of destination, was as follows:

"That at his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed and water and attend to the same while they may be in the stock yards of the company or lots where waiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit of otherwise, and thereby agrees that the company shall not be liable for any loss or damage to said stock while being so in the shipper's charge, and so cared for and attended to by the shipper or his or their employees as aforesaid; and in case where the company shall furnish laborers to assist in the loading, unloading and reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and that they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employees while so engaged, and the company shall in no wise be liable for their acts of negligence."

25 Wherefore, these defendants say that under the terms and provisions of the contract, as hereinbefore quoted, it was the duty of the plaintiff, or his agent in charge of said stock, to look after and care for, attend to and to feed and water the said stock while en route, and these defendants say and allege that if the said stock were not given all the feed, water and rest which the agent of the plaintiff in charge of said horses wished them to have, and if the plaintiff's horses suffered any damages by reason of lack of feed, water and rest en route, then said damages were due to the negligence of the plaintiff's said agent or employee who was in charge of the said shipment and whose duty it was, under the terms and provisions of the contract of shipment to see that the said horses were properly fed, watered and rested while en route, and these defendants here and now plead such negligence in bar of any recovery herein.

8.

For further and special answer herein, if so required, these defendants say that if the horses in question were injured while being transported from Watrous, New Mexico to El Paso, Texas, and from El Paso, Texas to Waco, Texas (which is not admitted but expressly denied) then such injuries, if any, were caused and occasioned by the inherent vices of the said horses and their natural propensities to kick, fight and bite each other when confined in the car for shipment, and for such injuries and damages, if any, so caused and occasioned, these defendants say they are not liable to the plaintiff,

26 tiff, and plead same in bar of the plaintiff's right of recovery herein against them or either of them, for any damages so inflicted.

9.

And for further and special answer herein, if so required, these defendants plead as a bar to the plaintiff's right of recovery herein against them, or either of them, the following facts:

In the plaintiff's original petition filed herein in this Court on March 2, 1915, it is disclosed that the suit was brought against these defendants, and citation therein served upon them therein, upon a cause of action arising out of the execution of an express contract of shipment and the breach of same. Defendants further say and show that the cause of action sued upon as disclosed by the plaintiff's first amended original petition filed herein on December 20, 1915, is one arising from an implied contract. These defendants, therefore, further show to the Court that the cause of action sued upon by the plaintiff arose during the month of October, 1913, and that the cause of action sued upon in the plaintiff's first amended original petition filed herein on December 20, 1915 was first pleaded and alleged in Court on said December 20, 1915, more than two years after the happening of the said injuries and damages as complained of and after the accrual of said cause of action, and these defendants, therefore, now and here plead the Statute of limitation of two years in bar of the plaintiff's right of recovery herein
27 against these defendants, or either of them, upon the cause of action asserted in the plaintiff's said first amended original petition filed herein on December 20, 1915, which is a suit upon an implied contract.

10.

If these defendants are mistaken as to the validity and effect of the contract and its provisions executed at Watrous, New Mexico, which has been pleaded heretofore, then, in the alternative, as to the pleas raised under said contract, these defendants plead that at El Paso, Texas, the Texas & Pacific Railway company and plaintiff's agent entered into a contract of shipment governing the transportation of plaintiff's horses from El Paso, Texas to Fort Worth, Texas, en route to Waco; that one of the provisions of said contract executed at El Paso is as follows:

"Fourth. That said shipper, at his own risk and expense, is to take care of, feed, water and attend to said stock while the same may be in the stock yards of the carrier, or elsewhere, awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload, reload same at feeding & transfer points, and wherever the same may be unloaded and reloaded for any purpose whatever, and hereby covenants and agrees to hold said carrier harmless on account of any loss or damage to his stock while being so in his charge, and so cared for and attended to by him, or his agents or employees, as aforesaid, except such damages as
28 may result from the negligence of the carrier." This provision being reasonable as a matter of law.

These defendants plead that it was the plaintiff's agent's duty to care for, feed and water the horses en route from El Paso, Texas to Fort Worth, Texas according to the provisions of said contract herein quoted, and that if said horses of plaintiff were damaged on account of the lack of feed and water, then said damage was due to the negligence of plaintiff's agent, for which these defendants are not liable; and this matter these defendants specially plead as a bar to plaintiff's recovery for any damages covered by the failure of plaintiff's horses to have feed and water.

11.

If the defendant "Katy" (so called by plaintiff in his amended petition) is mistaken as to the validity and effect of the initial contract executed at Watrous, New Mexico, the provisions of which have heretofore been plead by these defendants, then in the alternative the "Katy" defendant pleads as a bar to any recovery for damages to plaintiff's horses from Fort Worth to Waco, Texas by reason of their failure to have feed and water, the following facts:

At Fort Worth, Texas, plaintiff's agent and defendant "Katy" entered into a written contract covering the carriage of plaintiff's horses from Fort Worth, Texas to Waco, Texas; that one
29 of the provisions of same is as follows:

"2. The shipper shall unload, load and reload said cars, and see that the same are securely fastened, and shall feed and water said live stock and attend to them while in the carrier's stock yards, pens, or said cars at his own cost and expense; but the carrier agrees to allow said shipper free use of its pens and chutes."

This provision is reasonable as a matter of law.

The defendant "Katy" pleads that it was plaintiff's agent's duty to water and feed his horses en route from Fort Worth to Waco, Texas, and that in the event said horses were damaged by not being fed and watered between said points, which is denied, then this defendant pleads plaintiff's agent's negligence in failing to feed and water said horses as a bar to any recovery by plaintiff vs. defendant for said damage.

Wherefore, these defendants pray the Court that upon a final hearing hereof a judgment be rendered in their favor, and that they go hence without day and recover their costs.

THOMPSON AND BARWISE AND
GEORGE THOMPSON, JR.,

Attorneys for Defendants.

Filed Dec. 21, 1915. W. H. Logan, County Clerk.

30 *Amended Ans. of Defts. A., T. & S. F. Ry. Co. and R. G.,
 E. P. & S. F. Ry. Co.*

Dec. 18, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RAILWAY Co. et al.

1.

Now come the Atchison, Topeka & Santa Fe Railroad Company and the Rio Grande, El Paso & Santa Fe Railroad Company, two of the defendants in the above styled and numbered cause, and except generally to plaintiff's petition on file herein, and say that the same is insufficient in law and states no cause of action against these defendants, and of this exception defendants pray the judgment of the Court.

2.

Defendants specially except to that part of paragraph five of plaintiff's petition, reading as follows: "Plaintiff represents that all said defendants were very negligent and careless in the handling of said animals, and handled same roughly, jerking and injuring same," for the reasons that the said allegation is too vague, remote and indefinite to form a basis of recovery herein, and does not advise these defendants in what manner, if at all, they were negligent in the handling of said animals, and does not state when or where the same were roughly handled, jerked and injured, or whether or not such rough handling, jerking and injury occurred on the

31 lines of these defendants or upon the line of some other one of the defendant railway companies herein, in being undisputed that the shipper, or his agent accompanied said shipment, and these defendants are not advised as to what proof the plaintiff will undertake to offer in support of said allegations in order that they may prepare their defense. And of this exception defendants pray the judgment of the Court.

3.

Defendants further specially except to that part of paragraph five of plaintiff's petition reading as follows: "That they failed and refused to water, feed or furnish food of any kind or to furnish water to said animals en route for forty-three hours at a time," for the

reason that the said allegation is too vague, and indefinite, it not being alleged where or when, if at all, these defendants failed and refused to feed and water or furnish feed and water for the said horses, and it not being alleged whether such failure to feed and water or furnish feed and water was on the part of either one of these defendants, or upon the part of some other one of the defendant railroad companies in this case; and these defendants are not advised by the said vague and indefinite allegation as to what proof plaintiff will offer in support of said allegation in order that they may prepare their defense. And of this exception defendants pray judgment of the Court.

32

4.

Defendants further specially except to that part of paragraph five of plaintiff's said petition, reading as follows: "That one of the cars containing said animals was so negligently constructed and in such improper care and condition that one of said mares got her foot in through same, greatly injuring her," for the reason that the said allegation is too vague, remote and indefinite and does not state which one of the particular cars it is claimed was negligently constructed, and the said allegation does not state in what manner said car was negligently constructed, or in what manner it was in improper care and condition, and does not allege where and when and under what circumstances the said mare got her foot caught in the said defective car, and the defendants are not advised nor put on notice by the said allegations as to what proof plaintiff will offer in support of the said allegation in order that they may prepare their defense, and of this exception defendants pray the judgment of the Court.

5.

Defendants further specially except to that part of paragraph five of plaintiff's petition, reading as follows: "That five of said animals were crippled, four others were badly hurt, and all of said animals suffered great damage from want of water and proper care," for the reason that said allegation is too vague and indefinite, it not being alleged how or in what manner the said horses were crippled, or how and in what manner they were hurt, and defendants are not advised or put on notice by said allegation as to what proof the plaintiff will offer in support of said allegation in order that these defendants may prepare their defense. And of this exception defendants pray judgment of the Court.

33

6.

Defendants further specially except to that part of paragraph five of plaintiff's said petition, reading as follows: "Plaintiff was forced to sell said animals at Waco at a great and heavy loss, to-wit: \$400.00." for the reason that the said allegation is irrelevant and im-

material, and does not state the proper measure of damages herein, and of this defendants pray the judgment of the Court.

7.

Defendants further specially except to paragraph six of plaintiff's said petition, reading as follows: "That soon after said damages occurred plaintiff presented said defendant *in* his claim for \$200.00 damage, one-half the true amount, offering to settle for that amount; that defendants, after keeping said claim for a long time, rejected it," for the reason that the said allegation is irrelevant and immaterial, and highly prejudicial to the rights of these defendants. And of this exception defendants pray the judgment of the Court.

LEE, LOMAX & SMITH,
Attorneys for Defendant.

34

1.

For answer herein, if the same be required, these defendants deny all and singular the allegations in plaintiff's petition contained, and demand strict proof of the same, and of this they put themselves upon the country.

2.

For further and special answer herein, these defendants say that the shipment of horses involved in this suit, and on which this suit was brought to recover damages, was an inter-state shipment of horses from Watrous, New Mexico to Waco, Texas, and was subject to the laws of the United States governing such shipments. That the said shipment was delivered to the defendant Atchison, Topeka & Santa Fe Ry. Co. at Watrous, New Mexico, on or about October 9th, 1913, and that the plaintiff, B. Leatherwood, at the time his horses were delivered for shipment to the said defendant Atchison, Topeka & Santa Fe Ry. Co., and at and before the time when they were received by said defendant, entered into and executed a written contract with defendant covering said shipment of horses, which contract, among other things, provided as follows:

"It is further agreed that no suit or action against the company for the recovery of any damages accruing or arising out of said shipment or of any contract pertaining to the same, or the furnishing of facilities for such shipment, shall be sustained, in any Court of law or equity unless such suit or action shall be commenced within six months next after the loss or damages shall have occurred. The failure to institute any suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit."

These defendants would further show to the Court as above set out, that the shipment involved in this suit was made on October 9th, 1913, and that suit to recover damages arising out of said shipment was not filed in this Court until the 2nd day of March, 1915, at

which time more than six months had elapsed within which to bring suit for the recovery of damages arising out of the said shipment as provided for by the terms of the contract above quoted.

Wherefore, by reason of the failure of the plaintiff to comply with the terms of said contract, which was fair and reasonable, and which was willingly and voluntarily entered into by the plaintiff, and by reason of his failure to file his suit for damages within six months after the alleged damages occurred, these defendants here and now plead the said provision of said contract and the said failure of the plaintiff to file his suit within the prescribed time of six months, in bar of any recovery herein, and show to the Court that under the terms and provisions of the contract above set out, limitation
36 had run against the said cause of action before suit was instituted thereon.

Wherefore, defendants pray that they be discharged with their costs.

3.

For further and special answer herein these defendants say that the said shipment of horses was received at Watrous, New Mexico, on or about the 9th day of October, 1913, and that the plaintiff as alleged in his petition entered into and executed a written contract with these defendants covering the said shipment of horses.

Defendants say that no damage or injury occurred to these horses while they were in the possession of these defendants, but that they were delivered to the connecting carrier of these defendants at El Paso, Texas, in good condition.

Defendants pray that in the event any judgment should be obtained against them on account of damages or injuries to the said horses that they have judgment over and against their co-defendants, the Texas & Pacific Railway Company, and the Missouri, Kansas & Texas Railway Company of Texas, for the amount of any such damages as may be found against these defendants.

4.

37 For further and special answer herein these defendants say that the said shipment of horses was received by them at Watrous, New Mexico, and was promptly and carefully transported over the lines of these defendants from Watrous, New Mexico to El Paso, Texas, and there delivered to the Texas & Pacific Railway Company in the same condition which they were received at Watrous, New Mexico; that the said horses were watered at Albuquerque, New Mexico; that the said horses as above alleged were transported under a written contract entered into by plaintiff with the defendants, which contract provided, among other things, as follows:

"That at his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed and water and attend to same while they may be in the stock yards of the company or lots where awaiting shipment, and while the same is being

loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points whether the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit, or otherwise, and thereby agrees that the company shall not be liable for any loss or damage to said stock while being so in the shipper's charge, and so cared for and attended to by the shipper or his or their em-

38 employees as aforesaid; and in case where the company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and that they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employees while so engaged, and the company shall in no wise be liable for their acts or negligence."

Wherefore defendants say that under the terms of the contract it was the duty of the plaintiff or his agent in charge of said stock to look after the feeding and watering of said stock and if the said stock were not given all the feed and water which the agent of the plaintiff in charge of the horses wished them to have that the said lack of food and water was due to the contributory negligence of the plaintiff's agent and employee who was in charge of the said shipment, and whose duty it was under the terms of the contract covering said shipment, as above set out, to see that the said horses were properly fed and watered, wherefore, these defendants say that the plaintiff ought not to recover against them herein, and pray that they do hence without day and recover their costs.

5.

39 For further and special answer herein, these defendants say that if the horses in question were injured while being transported from Watrous, New Mexico to El Paso, Texas, which is not admitted, but expressly denied, then the said injuries were caused by the inherent vice of the said horses and by their natural propensities to kick and fight and bite each other when confined in a car for shipment and said injuries, if any, were not caused by these defendants and the defendants are not liable for same.

LEE, LOMAX & SMITH,
Attorneys for Defendants A., T. & S. F.
Ry. Co., R. E., E. P. & S. F. Ry. Co.

Filed December 18, 1915. W. H. Logan, County Clerk.

40 *Plaintiff's First Supplemental Petition.*

Dec. 21, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RAILWAY Co. et al.

To said Honorable Court:

Comes now your petitioner, B. Leatherwood, plaintiff, and by way of reply to the amended answer filed herein by the defendants, he files this, his first supplemental petition wherein he pleads as follows, to-wit:

1.

That part of the so-called contract which is set out, copied and plead in paragraph 2 of the answer filed herein by the Santa Fe Companies, was and is without consideration and is under the facts of this case illegal, unreasonable, null and void, and same is not binding on this plaintiff, for the following, among other reasons, to-wit:

1. Said so called contract was and is wholly without consideration, and it never became a legal and binding contract.

2. Said provision of said so called contract was, and it is unreasonable, null and void.

3. If said provision ever was binding, said defendants waived same for that, soon after the injuries complained of by plaintiff, and soon after his cause of action arose he, in performance of other provisions of said writing made out and presented to the proper agents of said defendants his claim for damages arising out of the shipment of his horses, which claim he, on, to-wit: the 6th day of December, 1913, presented in writing to A. G. Hood, the said defendants' agent at Watrous, New Mexico, for adjustment and settlement by said defendants; said claim was duly received by said agent, and it was by him duly transmitted to the proper agents and authorities of said defendants for investigation and settlement. Said defendants, after receiving said claim, duly transmitted same to its co-defendant, the Texas & Pacific Railway Company for investigation, adjustment and settlement; said last named defendant, after receiving said claim, sometime about the last of December of said year, or the first part of January, 1914, proceeded to investigate the movement of said stock over its lines, and the merits of said claim, and in so doing said defendant transmitted said claim for investigation to the proper authorities of its co-defendant, the said Katy Company, and

said company proceeded to investigate same. The investigation of said claim by said several defendants was not completed, and they made no report thereon to this plaintiff until the 29th day of May, 1914, when said investigations were completed and said claim was for the first time rejected and disallowed by defendants. Plaintiff is

42 making out and seeking an adjustment of his said claims, presented same only for the sum of \$200.00, which was much less than his actual damages with the view and in the hope of securing an amicable settlement thereof without litigation; said defendants, upon receiving said claim instituted their several investigations thereof, as above set out, and held and retained said claim under the pretense of investigating same for more than six months, viz: until May 29th, before notifying the plaintiff that the claim was rejected, and would not be paid; plaintiff, believing that said claim would be adjusted and paid, and relying on defendants to do so, and being deceived and misled by the actions of defendants as above set out, was induced to forego and he did forego instituting suit to recover his said damages until after the six months' period had expired. Wherefore, he says that the stipulation in said so-called contract which is now plead by defendants has been waived, and said defendants are estopped from enforcing same against plaintiff.

2.

Replying to paragraph 4 of the answer of said Santa Fe Companies, plaintiff pleads as follows, viz: The provision of said so-called contract set out in said paragraph of said answer is unreasonable, null and void for the following reasons, viz:

1. It was and is wholly without consideration.

43 2. The defendants assumed the duty and responsibility of feeding and watering said stock while in transit, and thus relieved plaintiff of so doing.

3. Defendants, T. & P. Company and Katy Company, failed to furnish plaintiff suitable and proper facilities for feeding and watering said stock between Big Spring and Waco.

4. Said provision of said so called contract was and is unreasonable as applied to the facts of this case, and has been waived by defendants.

3.

Replying to paragraph 6 of the Amended Answer of the T. & P. Company and the Katy Company, plaintiff says: The provision of the original so-called contract as set out in said paragraph of said answer was and is unreasonable, illegal and not binding on plaintiff for the following reasons, to-wit:

1. It is and was without consideration.

2. It is unreasonable and oppressive.

3. It was waived by said defendants for that they, and each of them, refused to accept said stock and to move same under and in performance of said contract, and instead of so doing said T. & P.

Co., upon receiving said stock at El Paso, before moving same, required plaintiff, shipper in charge of said stock, to make and enter into another and different contract; the seventh paragraph whereof reads as follows, to-wit: "Seventh: It is further agreed that
44 no suit of action against the company for the recovery of any damages ac-ruing or arising out of said shipment or any contract pertaining to same, or the furnishing of facilities for such shipment, shall be sustained in any Court of Law or equity unless such suit or action shall be commenced within two years next after the cause of action shall have accrued." Wherefore said defendants are estopped from claiming the benefits and provisions of said original so-called contract made with said Santa Fe Companies at Watrous, New Mexico.

4.

Replying to the 7 and 10 paragraphs of said answer of said defendants, plaintiff says that the provision of said contracts so plead by defendants are illegal, null and void, for the following reasons, to-wit:

1. Said contracts are without consideration.
2. Plaintiff's shipper was required to sign said T. & P. contract at El Paso under duress, and as a condition precedent to the movement of said stock over said defendants' lines. Wherefore, said so called contract was, and is not binding on plaintiff.
3. Said defendants asumed the duty of watering and feeding said stock, and negligently failed to do so.
4. Said defendants negligently failed to provide plaintiff any
45 facilities for feeding and watering said stock between Big Springs and Waco. Wherefore, said provision of said contract is not binding on plaintiff; and they failed and refused to afford plaintiff's agent in charge of said stock any opportunity to properly feed and water and rest same between Big Springs and Waco.

5.

Replying to paragraph 11 of said amended answer, plaintiff says that the provision of the so called Katy Contract, therein set out and pleaded, was and is unreasonable, illegal, null and void, and that same was waived by defendants for the following reasons, to-wit:

1. It was and is wholly without consideration.
2. Said provision was and is unreasonable and oppressive.
3. Said defendant afforded plaintiff's shipper accompanying said stock no opportunity to, and furnished no facilities for feeding and watering said stock.
4. Said contract so called was signed and executed by said shipper under duress, for that said defendand refused to accept and transport said stock under or in performance of either of the contracts previously executed, and demanded as a condition precedent to the movement of said horses over its lines that said shipper execute said Katy Contract, and he was forced to do so in order to have

46 said stock moved at all over said line. Wherefore, said so called contract was and same is not binding on plaintiff.

6.

Said defendants, T. & P. Company and Katy Company, having refused to move said stock over their respective lines of railway under said Santa Fe contract, and having repudiated same, and having forced plaintiff's shipper to execute new contracts, as above set out, without consideration, and under duress, neither of said so called contracts is binding on plaintiff, and this he is ready to verify.

TEMPLETON & MILAM AND
C. A. WRIGHT,

Attorneys for Plaintiff.

Filed December 21, 1915. W. H. Logan, County Clerk.

47 *Court's Main Charge to the Jury.*

Dec. 22, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RAILWAY Co. et al.

GENTLEMEN OF THE JURY: In this case you are instructed as to the law as follows, to-wit:

1.

Ordinary care, as that term is used in this charge, means such care as a person of ordinary caution and prudence would use under the same or similar circumstances; and failing to use such care would constitute negligence.

2.

Negligence, as that term is used in this charge, means the doing of something which a person of ordinary caution and prudence would not do, or the omission to do something which a person of such caution and prudence would do under the same or similar circumstances.

3.

By the term proximate cause, as used in this charge, means some cause, the ordinary and natural results of which might have been

reasonably anticipated, in the light of attending circumstances, and expected to produce or result in some injury to the property in question, and which, without the intervention of some independent cause actually produces or materially contributes to the injury complained of.

4.

It was the duty of the defendant, Texas & Pacific Railway Company, upon receiving plaintiff's car of horses at El Paso, to exercise ordinary care to see and ascertain that the car in which they were transported was in reasonably good and suitable condition for the carriage of such stock, and it was the duty of said company to exercise ordinary care to provide and furnish for the transportation of said stock a car which was in reasonably good condition and suitable for that purpose, and a failure so to do would constitute negligence. It was also the duty of said defendant company, upon receiving said stock at El Paso, to exercise ordinary care to transport same with reasonable diligence over its line of railway to Fort Worth, and to handle same while in transit over said line with reasonable care and dispatch; and it was further the duty of said company, upon reaching Fort Worth with said stock, to transfer and deliver same with ordinary care and dispatch to its co-defendant, the Missouri, Kansas & Texas Railway Company of Texas, for transportation to their destination, and a failure on the part of said Texas & Pacific Railway Company to thus transport and handle said stock while in its custody would constitute negligence.

5.

If you find and believe from the evidence that said defendant, Texas & Pacific Railway Company after receiving plaintiff's stock at El Paso, negligently failed to provide and furnish a suitable car in which to transport same, or that it negligently failed to properly inspect the car in which they were being transported, and to ascertain that same was in a suitable condition for the transportation of said stock, or if you find and believe from the evidence that said defendant, after receiving said stock for transportation, as aforesaid, negligently failed to transport same over its line of railway from El Paso to Fort Worth with reasonable and ordinary care and dispatch, or that it negligently and roughly handled said stock while in transit over its said line of railway, or if you find and believe from the evidence that said defendant company, by reason of negligent delays in transporting said stock over its line of railway, negligently failed to deliver said stock at Fort Worth to its co-defendant, as soon as they should and would have been delivered to said defendant but for such negligent delays on the line of the said T. & P. Railway Company, if you find there were such delays; and if you further find and believe from the evidence that as a direct and proximate result of such negligence on the part of said defendant in one or more of the particulars above enumerated plaintiff's stock were injured and damaged and depreciated in value more than they other-

wise would have been but for such negligence, if you find there was any such negligence, then you are instructed to find for plaintiff against said defendant, and to assess his damages as directed in Paragraph 9 of this charge.

6.

It was the duty of the defendant, Missouri, Kansas & Texas Railway Company of Texas, upon receiving plaintiff's stock at Fort Worth, to exercise ordinary care to handle and transport same over its line of railway from Fort Worth to destination at Waco, and to there deliver same with like care and dispatch to the consignee thereof, and a failure on the part of said defendant so to do would constitute negligence.

7.

If you find and believe from the evidence that said defendant, Katy Company, upon receiving plaintiff's stock at Fort Worth, negligently failed to transport same to their destination with ordinary care and dispatch, or that it negligently and carelessly handled same while in transit over its said line of railway; and if you further find and believe from the evidence that as a direct and proximate result of such negligence on the part of said defendant if you find there was any such negligence, plaintiff's stock were injured and damaged and depreciated in value more than they otherwise would have been, you will, in such event, find for plaintiff against said defendant, and assess his damage as directed in Paragraph 10 of this charge.

51

8.

The shipment of stock in question was an interstate shipment, and, under the law, the said defendant, Katy Company, was forbidden and prohibited from keeping said stock confined in the cars without unloading for food, rest and water for a longer period than twenty-eight consecutive hours from the time they were loaded out on the T. & P. at Big Spring. You are instructed that the undisputed evidence shows that said stock were kept confined in the car in which they were being transported, without food, rest and water, and without being unloaded for a longer period than twenty-eight hours, and if you find and believe from the evidence that said defendant was guilty of negligence in keeping said stock so confined, and that as the direct and proximate result of such confinement in said car in excess of the twenty-eight hour period said stock were injured and damaged more than they otherwise would have been, you will, in such event, find for plaintiff against said defendant, Katy Company, such damages as you may find was the direct and proximate result of such confinement in said car beyond the twenty-eight hour period, and you will assess his damage as directed in Paragraph 10 of this charge.

9.

If, under the foregoing instructions, you find for plaintiff against defendant, Texas & Pacific Railway Company, you will find and estimate such damage as you find resulted to plaintiff's stock from the negligence of said defendant, if you find such negligence, and you will estimate such damage so found, if any, at the difference between the market value of said stock at Waco at the time they should and would have arrived there but for the negligence of said defendant, if any, and the market value of said stock at the time and in the condition they did arrive there, excluding such damage, if any, as you find resulted in said stock from the negligence of the defendant, Katy Company.

10.

If, under the foregoing instructions, you find for plaintiff against the defendant, Katy Company, you will in such event find for the plaintiff such damage as you may find from the evidence resulted to said stock from the negligence of said company, if any, estimating such damage at the difference between the market value of said stock at Waco at the time and in the condition they should and would have reached there but for the negligence of said company, if any, and their value at the time and in the condition they did reach there, excluding from such estimate such damage, if any, as you find resulted to said stock from the negligence of the defendant, Texas & Pacific Railway Company.

11.

If you find for plaintiff against one or both of said defendants you may also find interest on the amount you may so find from the 16th day of October, 1913, to the present time, at the rate of six per cent per annum.

12.

You are instructed that in no event will the plaintiff be entitled to recover any damage which you may believe and find from the evidence resulted to his stock solely from their inherent vices or propensities, and which injury and damage was not caused or contributed to in some material way by the negligence, if any, of the defendant or defendants, as the case may be, and in estimating the damage to plaintiff's stock, if any, in the event you find for plaintiff against one or both of such defendants, you will exclude from such estimate any and all such damage as you may find resulted to said stock solely from their inherent vices or propensities, if any such there was.

13.

If you should believe and find from the evidence that the defendant, Texas & Pacific Railway Company, after receiving plaintiff's stock for shipment at El Paso, exercised ordinary care in the handling and transportation of same over its line of railway, and in delivering said stock to its co-defendant, the Katy Company, and that it exercised ordinary care in furnishing a proper and suitable car for the transportation of said stock over its line of railway, or if you fail to find that said defendant was guilty of negligence in handling said stock, or if you fail to find that said stock was
54 injured or damaged by such handling or negligence, as the case may be, if you find there was negligence, you will, in such event, find for said defendant; likewise, if you find that the defendant, Katy Company, was not guilty of negligence in the handling and transportation of said stock over its line of railway, or if there was such negligence that the plaintiff's stock was not injured or damaged thereby, you will, in such event, find for said defendant.

14.

The burden of proof is on the plaintiff to prove the facts which will entitle him to recover by a preponderance of the evidence, and if he has failed to discharge such burden you will, in such event, find for the defendant or defendants as to which he has so failed. You are the sole judges of the credibility of the witnesses and of the weight of the evidence, but the law of the case you must receive from this charge and be governed thereby.

CHARLES T. PREWETT, *Judge*.

Filed December 22, 1915. W. H. Logan, County Clerk.

55

Defendants' Special Charge No. 1.

Dec. 22, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RAILWAY CO. et al.

Special Charge No. 1 Requested by Defendants Texas & Pacific Ry. Co. and M., K. & T. Ry. Co. of Texas.

GENTLEMEN OF THE JURY: In this case you are instructed to return a verdict in favor of the defendants, Texas & Pacific Railway

Company and the Missouri, Kansas & Texas Railway Company of Texas, for the following, or any of the following reasons, to-wit:

1. Plaintiff failed to file suit for damages arising out of the shipment of horses within the period of six months after the accrual of such damages, as the plaintiff agreed to do in the original contract issued at Watrous, New Mexico, which contract was made and entered into by and between the plaintiff and the Santa Fe Lines of railway, and which contract inured to the benefit of these defendants.

2. Plaintiff's cause of action in this suit is barred by the Statute of limitation of two years in as much as the allegations in the amended pleadings of the plaintiff state a cause of action arising out of an implied contract, which said cause of action is pleaded for the first time on December 21, 1915, a time more than two years after the accrual of the injuries and damages made the basis of the suit.

3. The plaintiff has failed to prove that the defendants, or either of them, were negligent in any of the respects alleged in plaintiff's said amended petition, and plaintiff has failed to prove that he suffered any damages by reasons of any of the alleged negligence of these defendants, or either of them.

THOMPSON & BARWISE AND
GEORGE THOMPSON, Jr.,
*Attorneys for Defendants T. & P. Ry.
Co. and M., K. & T. of T.*

Refused,

CHARLES T. PREWETT, *Judge.*

Filed December 22nd, 1915. W. H. Logan, County Clerk.

57 *Defendants' Special Charge No. 2.*

Dec. 22nd, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants T. & P. Railway Company'- Special Charge No. 2.

GENTLEMEN OF THE JURY: You are instructed to return a verdict for the Texas & Pacific Railway Company for the following reasons:

1. There has been introduced no evidence to show that the Texas & Pacific Railway Company was guilty of any of the acts of negligence charged.

THOMPSON & BARWISE,
Attorneys for Defendant T. & P. Ry. Co.

Refused,

CHARLES T. PREWETT, *Judge.*

Filed December 22nd, 1915. W. H. Logan, County Clerk.*

58 *Defendants' Special Charge No. 3.*

Dec. 22nd, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Special Charge No. 3 Requested by Defendants, Texas & Pacific Ry. Co. and M., K. & T. Ry. Co. of Texas.

GENTLEMEN OF THE JURY: If you find and believe from the evidence in this case that the defendant, Texas & Pacific Railway Company, furnished to the plaintiff, or to his agent, a safe and suitable car for the transportation of the plaintiff's horses from El Paso to Fort Worth, Texas, or if you find and believe from the evidence in the case that none of the horses in the shipment were damaged as the proximate result of a hole or broken plank near the bottom of said car, and if you further find that the defendant Texas & Pacific Railway Company furnished to the plaintiff's agent facilities for feeding and watering the said horses from Big Springs, Texas to Fort Worth, Texas, and at Fort Worth, then you are instructed to return a verdict for the defendant, Texas & Pacific Railway Company.

THOMPSON & BARWISE,
Attorneys for Defendants.

Refused,

CHARLES T. PREWETT, *Judge.*

Filed December 22nd, 1915. W. H. Logan, County Clerk.

59

Defendants' Special Charge No. 4.

Dec. 22, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. COMPANY et al.

Special Charge No. 4 Requested by Defendant Missouri, Kansas
& Texas Ry. Company of Texas.

GENTLEMEN OF THE JURY: You are instructed that it was the duty of the plaintiff's agent who accompanied the shipment of horses from Forth Worth to Waco, Texas, to load, unload, reload, feed and water the said horses in the shipment between said points, in the event facilities were afforded the plaintiff's said agent to do so by the defendant, Missouri, Kansas & Texas Railway Company of Texas; and you are further instructed that if you find and believe from the evidence that facilities were furnished at Fort Worth, or en route to plaintiff and his agent for feeding and watering said stock then, even though you find that the plaintiff's horses were damaged as the result of their failure to feed and water between said points, you are instructed to return a verdict for the defendant, M., K. & T. Ry. Co. of Texas.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,
M., K. & T. Ry. Co. of Texas and T. & P.

Refused,

CHARLES T. PREWETT, *Judge.*

Filed December 22nd, 1915. W. H. Logan, County Clerk.

Dec. 22nd, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Special Charge No. 5 Requested by Defendant Texas & Pacific Railway Company.

GENTLEMEN OF THE JURY: You are instructed that it was the duty of the plaintiff's agent who accompanied the shipment of horses from El Paso to unload, reload, and to feed and water the horses in the shipment while in the course of transportation, and while in the cars and in the pens of the defendant between the points, in the event the Texas & Pacific Railway Company afforded to the plaintiff and his agent facilities for so doing; and you are further instructed that if you find and believe from the evidence that facilities were furnished to the plaintiff or his agent for feeding and watering said horses en route from El Paso to Fort Worth, Texas, and at Fort Worth, then, even though you may find that the plaintiff's said horses were damaged by reason of their failure to have feed and water between and at said places, you are instructed to return a verdict for the defendant, Texas & Pacific Railway Company as to the damages, if any, caused by the failure of the said horses to have feed and water between said points.

61

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,

Attorneys for Defendants

T. & P. Ry. Co. and M., K. & T. of T.

Refused,

CHARLES T. PREWETT, *Judge.*

Filed December 22nd, 1915. W. H. Logan, County Clerk.

62 *Defendants T. & P. Ry. Co.'- Special Charge No. 6.*

Dec. 22nd, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants T. & P. Ry. Company'- Special Requested Instruction
No. 6.

GENTLEMEN OF THE JURY: You are instructed that it was the duty of plaintiff or plaintiff's agent who accompanied the shipment of horses from El Paso, Texas to Fort Worth, Texas, to load, unload, feed, water and rest said horses in the pens en route between said points, in the event that facilities were afforded to him for so doing by the Railway Company, and you are further instructed that if you find and believe from the evidence that facilities for loading, unloading, feeding, watering and resting plaintiff's horses were afforded to plaintiff's agent between El Paso, Texas and Fort Worth, Texas, and at Fort Worth, Texas by the Texas & Pacific Railway Company, then, as to such damages, if any you find, as were suffered by plaintiff's horses by reason of their failure to be
63 unloaded, reloaded, fed, watered and rested between Fort
Worth, Texas and El Paso, Texas, you will not hold the Texas & Pacific Railway Company liable therefor.

THOMPSON & BARWISE,

Refused,

Attorneys for Defendant.

CHARLES T. PREWETT, *Judge.*

December 22nd, 1915. W. H. Logan, County Clerk.

64 *' Defendants' Special Charge No. 7.*

Dec. 22, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Special Charge Number 7.

GENTLEMEN OF THE JURY: You are instructed that it was plaintiff or his agent's duty to load, unload, feed, water and rest his

horses from El Paso, Texas to Waco, Texas, in the event facilities were afforded him for so doing by the defendants upon their respective lines of railway; and if you find and believe from the evidence that facilities for so doing were furnished plaintiff, or his agent, you are instructed not to hold these defendants liable for such damage, if any, that plaintiff's horses suffered by reason of their failure to be unloaded, watered and fed en route between said points, if you find such was the case, even though you may find and believe from the evidence that said horses were confined in the cars for a longer period of time than 28 hours in violation of the law which has heretofore been presented to you.

THOMPSON & BARWISE,

Attorneys for Defendants.

Refused,

CHARLES T. PREWETT, *Judge.*

Filed December 22nd, 1915. W. H. Logan, County Clerk.

65

Defendants' Special Charge No. 8.

Dec. 22, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. COMPANY et al.

Special Charge No. 8 Requested by Defendant Texas & Pacific Ry. Co. and the M., K. & T. of Texas.

GENTLEMEN OF THE JURY: You are instructed that if you find and believe from the evidence in this case that the defendant, Texas & Pacific Railway Company, after receiving the plaintiff's said horses at El Paso, Texas for shipment, used ordinary care to handle and transport the said horses from El Paso, Texas to Big Springs, Texas; and if you further find and believe from the evidence that the defendant, Texas & Pacific Railway Company furnished a safe and suitable car at El Paso, Texas for the transportation of the plaintiff's said horses; and if you further find and believe from the evidence in this case that the plaintiff's agent who accompanied the shipment of horses was afforded facilities for feeding and watering said horses, or if in this connection you find and believe from the evidence in the case that the plaintiff's horses were not damaged from a failure to receive feed and water while en route from El Paso to Fort

66

Worth, Texas, then you are instructed to return a verdict for the defendant, Texas & Pacific Railway Company.

THOMPSON & BARWISE AND

GEORGE THOMPSON, JR.,

Attorneys for Defendants T. & P. Ry. Co. and,

M., K. & T. Ry. Co. of T.

Refused.

CHARLES T. PREWETT, *Judge.*

Filed December 22nd, 1915. W. H. Logan, County Clerk.

67 *Defendants' Special Charge No. 9.*

Dec. 22, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Special Charge No. 9 Requested by Defendants Texas & Pacific Ry. Co. and the M., K. & T. of Texas.

GENTLEMEN OF THE JURY: For such damages, if any, as the plaintiff's said horses sustained by reason of the handling given said horses en route from Watrous, New Mexico to El Paso, Texas by the Santa Fe Lines, you are instructed that these defendants are not liable.

THOMPSON & BARWISE AND

GEORGE THOMPSON, JR.,

Attorneys for Defendants T. & P. Ry. Co. and

M., K. & T. Ry. Co. of Texas.

Given.

CHARLES T. PREWETT, *Judge.*

Filed December 22, 1915. W. H. Logan, County Clerk.

Defendants' Special Charge No. 10.

Dec. 22, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RAILWAY CO. et al.

Special Charge No. 10 Requested by Defendants Texas & Pacific Ry. Co., and M., K. & T. Ry. Co. of Texas.

GENTLEMEN OF THE JURY: If you find and believe from the evidence in this case that the plaintiff tendered his horses to the Texas & Pacific Railway Company for shipment from El Paso to Fort Worth, Texas, to be transported by defendant, Missouri, Kansas & Texas Railway Company of Texas from Fort Worth to Waco, Texas, then you are instructed that it was necessarily contemplated that the horses would be taken from their accustomed surroundings and confined in the cars where, even though handled with all possible care and diligence, they would be subjected to some jolting, jerking, fright and excitement by reason of their changed surroundings, and to some danger of injuring each other, and that more limited access to feed and water would be afforded them, all of which naturally tended to a deterioration in their condition. In determining whether or not their injuries during shipment were due to the inherent nature or proper vices of the animals, and for which you are instructed that these defendants would not be liable, these changed conditions and surroundings must be taken into consideration.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,*Attorneys for Defendants T. & P. Ry. Co. and
M., K. & T. Ry. Co. of Texas.*

Given,

CHARLES T. PREWETT, *Judge.*

Filed December 22nd, 1915. W. H. Logan, County Clerk.

70

Verdict of the Jury—Ex. A.

Dec. 21, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RAILWAY CO. et al.

December 21, 1915.

Hon. Judge Pruitt: We, the jury, find for the plaintiff in the sum of \$300.00, Three hundred Dollars, drawing 6% interest from the time of the sale of the horses until the suit is settled.

D. W. BRUMMITT, *Foreman.*

Exhibit A,

CHARLES T. PREWETT, *Judge.*

Filed December 21st, 1915. W. H. Logan, County Clerk.

71

Verdict of Jury—Exhibits B and C.

December 21, 1915.

Hon. Judge Pruitt:

We, the jury, find for the plaintiff in the sum of Three Hundred Dollars (\$300.00) against the Texas & Pacific Ry. and the Missouri, Kansas & Texas of Texas Ry., said \$300.00 bearing 6% — from the 16th of October, 1913, to the present time.

D. W. BRUMMITT, *Foreman.*

Exhibit B.

CHARLES T. PREWETT, *Judge.*

December 21, 1915.

We, the jury, find for plff., & apportion the damage against the Missouri, Kansas & Texas Ry. of Texas, \$50.00 Fifty Dollars, and against the Texas and Pacific Ry. \$250.00 Two hundred and Fifty Dollars, drawing 6% interest from the 16th day of October, 1913.

D. W. BRUMMITT, *Foreman.*

Exhibit C.

Filed December 21, 1915. W. H. Logan, County Clerk.

72 *Defts.' Motion to Order Mistrial and Discharge Jury.*

Dec. 22, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. COMPANY et al.

Come now, the defendants, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, and at this time present their motion requesting the Court to order a mistrial herein and discharge the jury for the following reasons, to-wit:

1.

After the Court's charge had been given to the jury, and the jury had retired to consider their verdict, the jury thereupon returned into Court the following written verdict:

"December 21, 1915.

Honorable Judge Pruitt:

We, the jury, find for the plaintiff in the sum of Three Hundred Dollars, bearing six per cent interest from the time of the sale of the horses until the suit is settled.

D. BRUMMITT, *Foreman.*"

The Court, after receiving said verdict, instructed the jury as follows:

73 "GENTLEMEN OF THE JURY: In your verdict just returned, you did not state as to which of the defendants the amount of damages was assessed, and you are instructed to retire to the jury room, taking with you the Court's charge, and be governed in accordance thereby."

Thereupon the jury retired to the jury room, and after a time returned to the Court the Following verdict:

"December 21, 1915.

Honorable Judge Pruitt:

We, the jury, find for the plaintiff, in the sum of Three Hundred Dollars against the T. & P. and the M., K. & T. Ry. Company; said Three Hundred Dollars bearing six per cent — from the 16th day of October, 1913, to the present time.

(Signed)

D. W. BRUMMITT, *Foreman.*"

Therefore, at this time, these defendants, in the light of the two verdicts above returned, ask the Court to order a mistrial herein and discharge the jury, for the reason that the jury has evidently been misled and confused by the Court's charge, and is being misled and is being confused, and does not know how to return a verdict
 74 in this case, and said jury is not being governed by the Court's charge, and is not following same, for the charge is clear and plain, but said jury is simply casting around in their own way without guidance from the Court's charge in attempting to return a verdict, and these defendants say that such a method of returning a verdict by a jury is illegal, improper and very prejudicial to both of these defendants, and for these reasons, without further questioning by the Court, there being an irreconcilable conflict and confusion in the minds of the jury as to the damages and the verdict, and by reason of all of the above facts, these defendants present this their motion, and request the Court to grant the relief prayed for herein.

THOMPSON & BARWISE AND
 GEORGE THOMPSON, JR.,
Attorneys for Defendants.

Dec. 22nd, 1915.

Motion overruled.

CHARLES T. PREWETT, *Judge.*

Filed December 22nd, 1915. W. H. Logan, County Clerk.

75 *Judgment.*

Dec. 22, 1915.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RAILWAY Co. et al.

Final Judgment.

December 22nd, 1915.

Be it remembered, That on this day the above entitled cause came on for trial, plaintiff and the several defendants appeared by their respective counsel and announced ready for trial, thereupon plaintiff by his counsel stated to the Court that he would no further prosecute his action against defendants Atchison, Topeka & Santa Fe Railway Company and the Rio Grande, El Paso and Santa Fe Railway Company. It is therefore considered, and it is so ordered that the plaintiff, B. Leatherwood, take nothing by reason of his suit against said above mentioned defendants, and they are each discharged with their

costs, and it is ordered that said defendants recover of plaintiff all their costs in this behalf expended for which let execution issue. The cause then proceeded to trial as between plaintiff and the defendants, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas. A jury having been demanded same was duly selected according to law. Whereupon the pleadings were read and the evidence was introduced. The Court then prepared his charge which was submitted to counsel for the plaintiff and
76 said defendants, and the charge was then read to the jury, together with the special charges given at the request of the defendants.

Thereafter the argument of counsel having been concluded the jury retired to consider their verdict and, after due deliberation, they returned into Court the following verdict, to-wit:

"December 21, 1915.

Hon. Judge Pruett:

We, the jury, find for the plaintiff in the sum of \$300.00, Three Hundred Dollars, drawing 6% interest from the time of the sale of the horses until the suit is settled.

D. W. BRUMMITT, *Foreman.*"

The Court declined to receive same as the verdict, because it did not apportion the damages found between the defendants. The jury then retired and thereafter returned into Court the following verdict, to-wit:

"Dec. 21, 1915.

Hon. Judge Pruett:

We, the jury, find for the plaintiff in the sum of three hundred dollars (300.00) against the Texas & Pacific Ry. and the Missouri, Kansas & Texas of Texas Ry. Said \$300.00 bearing 6% —
77 from the 16th day of October, 1913, to the present time.

D. W. BRUMMITT, *Foreman.*"

Which verdict being informal, the Court declined to receive as the completed verdict of the jury, and they were therefore instructed to retire, and again consider their verdict which they did. After due deliberation, they returned into Court the following verdict, to-wit:

"Dec. 21, 1915.

We, the jury, find for plff. & apportion the damage against the Missouri, Kansas & Texas Ry. of Texas 50.00 Fifty Dollars, and against the Texas & Pacific Ry. \$250.00 Two Hundred and Fifty Dollars, drawing 6% interest from the 16th day of October, 1913.

D. W. BRUMMITT, *Foreman.*"

Which verdict the Court received in connection with the verdict first rendered.

It is therefore considered and ordered that the plaintiff, B. Leatherwood, have and recover of and from the defendant Texas & Pacific Railway Company the sum of Two Hundred and Fifty Dollars, with six per cent interest thereon from October 16th, 1913 to this date as found by the jury, said amount aggregating Two Hundred and Eighty and 25/100 Dollars. It is further ordered that said plaintiff recover of and from the defendant, Missouri, Kansas & Texas Railway Company of Texas the sum of Fifty Dollars with six per cent interest thereon from October 16th, 1913 to this date as found by the jury, said amount aggregating Fifty-six and 05/100 Dollars. It is further ordered that plaintiff recover of and from said defendants all costs in this behalf expended, including the costs of taking all depositions taken and used on the trial hereof, but not including the costs above adjudged against plaintiff in favor of the two Santa Fe Companies, saving only the costs of taking and returning depositions used on the trial hereof, which are adjudged against the other defendants herein. It is further ordered that this judgment bear interest from this date at the rate of six per cent per annum. For all of which let execution issue.

79

Defendants' Motion for New Trial.

Dec. 23, 1915.

In the County Court of Tarrant County Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RAILWAY CO. et al.

Come now the defendant-, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, and file this their motion for a new trial herein, praying the Court to set aside the verdict of the jury returned herein on Dec. 22, 1915, and the verdict based thereon, for the following reasons, to-wit:

1.

The Court erred in failing and refusing to submit special charges No. 1 to 26, inclusive, for the reason set out in the respective Bills of Exception thereto.

2.

The Court erred in failing to instruct the jury not to consider the argument of counsel in arguing outside of the record.

3.

The Court erred in submitting to the jury the main charge, and certain parts thereof, for the reasons stated in the Bill of Exception thereto.

4.

80 The verdict of the jury and the judgment based thereon is contrary to the law and the evidence, and is the result of bias and prejudice.

Wherefore, defendants herein named pray the Court to set aside the verdict of the jury and the judgment based thereon, and grant them a new trial herein.

THOMPSON & BARWISE,
*Attorneys for Defendants T. & P. Ry.
Co. and M., K. & T. Ry. Co. of Texas.*

Filed December 23rd, 1915. W. H. Logan, County Clerk.

81 *Defendants' Amended Motion for New Trial.*

Dec. 31, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Come now the defendants, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, in the above entitled and numbered cause, and filed this their amended motion for a new trial, requesting the Court to set aside the verdict of the jury and the judgment returned herein, on December 22nd, 1915, and grant these defendants a new trial, for the following reasons, to-wit:

1.

The Court erred in failing and refusing to sustain these defendants' special exception No. 1, which was directed to certain parts of the plaintiff's amended petition, complaining of the manner in which the plaintiff's horses were handled from El Paso to Fort Worth, and further complaining of the manner in which the car in which the horses were transported between said points was unsuitable and de-

fective; the exception of defendants being that it was undisputed that the shipper's agent accompanied the horses the entire distance, and was on the train and cars at the time it was handled by the defendants, and this being true, the said allegations complained of were too

vague, indefinite and too general to apprise these defendants
82 as to the grounds of negligence upon which the plaintiff relied.

All of which is more fully set out in defendant's Bill of Exception No. 1, which is here referred to and made a part hereof.

2.

The Court erred in failing and refusing to sustain these defendants' special exception No. 2, which was directed to that part of paragraph 2 of plaintiff's amended petition, which complained of the defendant Texas & Pacific Railway Company furnishing an unsafe and unsuitable car into which the horses were loaded at El Paso, the allegation being that one of the horses caught her foot in a hole in said car and was injured; the exceptions to said allegations being that same was too vague, indefinite and general, in that it was undisputed that plaintiff's agent accompanied the shipment of horses the entire distance and was with the horses at the time the mare got her foot caught in the hole, and this being true, the allegation complained of was not sufficiently full and definite in regard to the defect in the car which injured the mare; all of which reasons are more fully set out in defendant's Bill of Exception No. 2, which is here referred to and made a part hereof.

3.

The Court erred in failing and refusing to sustain defendants' special exception No. 3, which complained of certain parts of
83 paragraph 2 of plaintiff's amended petition, where plaintiff alleged the manner in which his horses were handled from El Paso to Waco; the exceptions to said allegations being that same were too general, vague and indefinite in that it was undisputed that plaintiff's agent accompanied the shipment of horses the entire distance, and knew full well the manner of handling given them and it was therefore, in-umbent upon plaintiff to plead and allege specifically the acts of negligence upon which he sought to rely instead of pleading same vaguely, indefinitely and generally. All of which reasons are more fully set out in defendants' Bill of Exception No. 3, which is here referred to and made a part hereof.

4.

The Court erred in admitting in evidence over the objections of defendants, the depositions of F. S. Brooks and A. J. Baird, the testimony in said depositions being upon the question of whether or not the plaintiff submitted a claim to the carriers transporting his horses from Watrous, New Mexico, to Waco, Texas, and further, whether or not the defendants duly received notice of said claim

through any one of the carriers who received the original claim from plaintiff; defendants having pleaded a provision in the original contract or bill of lading requiring the institution of suit within six months after the damages occurred, and plaintiff having pleaded in answer thereto that said provision had been waived by the defend-

ants, in that plaintiff had forwarded his claim to the carriers for investigation, and that the carriers and defendants
84 herein made no report to him upon the claim delivered after the lapse of the six months, and that on account thereof, the defendants herein waived the said six months' provision pleaded. Defendants objected to said testimony for the reason that, even though said facts were true, yet the contract provided that the provision of same could not be waived, unless by an officer of the Company in writing, and further that said facts, even though true, would not in law constitute a waiver of said provision, and would not act as an estoppel, and further that said testimony was irrelevant and immaterial and introduced an issue before the jury which would only confuse and mislead them, thereby prejudicing defendants, all of which reasons are more fully set out in defendants' Bill of Exception No. 4, which is here referred to and made a part hereof.

5.

The Court erred in admitting *the* evidence in rebuttal, over the objection of these defendants, certain parts of the deposition of G. P. Butts with reference to the said Butts handling the plaintiff's shipment between El Paso, Texas and Toyah, Texas, for the reason that the said witness, Butts, was present at the trial, and had been put on the stand by these defendants, and had been subjected to cross-examination by the plaintiff's attorneys with reference to

his handling of the shipment, and at the time the deposition
85 was offered in evidence, said witness was still present in the Court room, and was available to plaintiff for cross-examination, and therefore, said testimony was irrelevant and immaterial, and the introduction of same in evidence was confusing, misleading and prejudicial to the defendants. All of which reasons are more fully set out in defendants' Bill of Exception No. 5, which is here referred to and made a part hereof.

6.

The Court erred in failing and refusing to grant these defendants' request to limit the testimony of G. P. Butts, which was contained in his deposition, and which plaintiff introduced in evidence, for the sole purpose of impeaching the said G. P. Butts, for the reason that the said G. P. Butts was in personal attendance in the trial of the case, and had been put on the stand by these defendants, and had been subjected to cross-examination by plaintiff's attorney, and at the time the plaintiff's attorney introduced the deposition of the said witness, Butts, the said party was still in attendance at the trial of the case, and was present in the Court room and the only reason, if

any, why said testimony was admissible, was for the purpose of impeaching the said Butts, and said testimony should not have been considered by the jury for any other purpose, and the refusal of the Court to grant these defendants' request to have the testimony complained of so limited for impeachment purposes was prejudicial to these defendants. All of which reasons are more fully set out in defendants' Bill of Exception No. 5, which is here referred to and made a part hereof.

7.

The Court erred in failing and refusing to grant these defendants' special charge No. 1, which instructed the jury to return a verdict for these defendants for the following reasons: Plaintiff's shipment moved under a contract executed at Watrous, New Mexico, by the initial carrier, covering the transportation of plaintiff's horses from Watrous, New Mexico to Waco, Texas, and as such was governed by the laws of the United States with reference to interstate commerce. The pleading of these defendants and the evidence, without dispute, showing that one of the provisions of said contract required the plaintiff to institute suit for any damages arising from said shipment, within six months after the damages occurred, and further that plaintiff had failed to comply with the said provision, and said provision being reasonable as a matter of law, and the contract providing that a failure to so institute suit would be a bar to plaintiff's recovery, said peremptory instruction should have been granted. All of which reasons are more fully set out in defendants' Bill of Exception No. 8, which is here referred to and made a part hereof.

8.

87 The Court erred in failing and refusing to grant these defendants' special charge No. 1, which instructed the jury to return a verdict for these defendants for the following reasons: That the evidence introduced by plaintiff at the trial of this cause, as well as the entire evidence, fails to show or prove that plaintiff's horses were damaged as a result of any negligence of these defendants, or tending to prove that these defendants were guilty of negligence as alleged in plaintiff's amended petition. All of which reasons are more fully set out in defendant's Bill of Exception No. 8, which is here referred to and made a part hereof.

9.

The Court erred in failing and refusing to grant these defendants' special charge No. 1, which instructed the jury to return a verdict for these defendants for the following reasons: That suit was instituted in March, 1915, upon a cause of action arising from an express contract, and trial being had upon an amended petition alleging a cause of action upon an implied contract, and these defendants having pleaded the two years' Statute of limitations in bar of a

recovery by plaintiff upon an implied contract, in that the same was not pleaded until December 21st, 1915, more than two years after the alleged damages occurred, the peremptory instruction should have been granted. All of which reasons are more fully set out in defendant's Bill of Exception No. 8, which is here referred to and made a part hereof.

88

10.

The Court erred in failing and refusing to give defendant's special charge No. 2, which instructed the jury to return a verdict for the Texas & Pacific Railway Company, for the reason that while plaintiff complained of certain grounds of negligence against the Texas & Pacific Railway Company, in handling plaintiff's horses from El Paso to Fort Worth, yet, the only evidence introduced by plaintiff tending to even attempt to prove these allegations was that of Fred Crowder, who accompanied the shipment as plaintiff's agent, and the evidence being without dispute that the Texas & Pacific Railway Company loaded plaintiff's horses at El Paso into the same car that they were originally loaded into from Watrous, New Mexico, and carried in from that point to El Paso, and the evidence failing to show that the Texas & Pacific Railway Company failed to provide a suitable car at El Paso, or failed to inspect the car at El Paso to see that it was suitable, and failing further to show that said car was unsuitable or defective at El Paso, and the evidence of Fred Crowder being to the effect that he could not remember as to the particular manner in which the horses were handled between El Paso and Fort Worth, but it was his judgment that between said points the horses were handled with no more than the usual and customary switching, jerking and bumping than is

89 given similar shipments for like distances by railway companies in Texas, and the evidence further failing to show any unnecessary delays or switching, the peremptory instruction should have been granted. All of which is fully set up in defendants' Bill of Exception No. 9, which is here referred to and made a part hereof.

11.

The Court erred in assuming that the initial contract, which these defendants pleaded was at Watrous, New Mexico, covering the shipment from that point to Waco, was either invalid or that the provisions of same that these defendants pleaded were invalid, or had been waived for the reason that said contract and certain of its provisions had been pleaded by these defendants, and the Court was unauthorized in assuming as a matter of law that the contract was void or illegal, or certain of its provisions were void or illegal, or had been waived for the reason that said facts were questions for the jury to determine, and not for the Court. All of which reasons are more fully set out in defendant's Bill of Exception No. 6, paragraph 16, which is here referred to and made a part hereof.

12.

The Court erred in the trial of this case, when the same was submitted to the jury on the Court's charge, in assuming that the initial contract made by the initial carrier at Watrous, New Mexico, and covering the shipment from that point to its final destination, Waco, Texas, was void for any reason pleaded by the plaintiff, or it or its provisions had been waived by the defendants for any of the reasons pleaded by plaintiff, in that at most the question of whether or not the contract was void for any reason, or it or its provisions had been waived for any reason was a matter for the jury to pass upon, and the Court having failed to permit the jury to pass upon this issue, and having assumed the above facts, such assumption is fundamental error.

13.

The Court erred in submitting to the jury any charge at all, for the reason that the Court should have granted these defendants' request for a peremptory instruction, as is more fully set out in paragraph 1 of Bill of Exception No. 6.

14.

The Court erred in submitting to the jury that part of paragraph 4 of his main charge which instructed the jury that it was the duty of the defendant Texas & Pacific Railway Company, upon receiving plaintiff's car of horses at El Paso, to exercise ordinary care to see and ascertain that the car in which they were transported was in a reasonably good and suitable condition for the carriage of said horses, and further that it was the duty of said company to furnish such a car, and that the failure of the company to do either one, or both of the above things, would constitute negligence, for the reason that the undisputed evidence was to the effect that the car in which plaintiff's horses were loaded at El Paso was the same car into which the horses were loaded at the point of origin, Watrous, New Mexico, and the undisputed evidence of plaintiff himself shows that he examined the car at Watrous, New Mexico, and that so far as he could determine the car was in good condition, and the undisputed evidence further showing that the horses moved from Watrous, New Mexico to El Paso without any injury, and there being no evidence from any witness proving or tending to prove that the car at the time the horses were loaded into same at El Paso was in any other condition except that in which it started from Watrous, New Mexico, it would be presumed in law, in the absence of proof to the contrary, that the car into which the horses were loaded at El Paso continued to be in the same condition at El Paso as it was at the point of origin, Watrous, New Mexico. All of which reasons are more fully set out in defendant's Bill of Exception No. 6, Paragraph 2, Sub-division A, which is here referred to and made a part hereof.

15.

The Court erred in submitting to the jury that part of paragraph 4 of his main charge, which instructed the jury that it was the duty of the defendant, Texas & Pacific Railway Company, upon receiving plaintiff's car of horses at El Paso, to exercise ordinary care to see and ascertain that the car in which they were transported was in a reasonably good and suitable condition for the carriage of said horses, and further that it was the duty of said company to furnish such a car, and that the failure of the company to do either one, or both of the above things would constitute negligence for the reason that said part of said charge is confusing and misleading, and is a reiteration and lays undue emphasis upon the duty of the Texas & Pacific Railway Company to provide a safe and suitable car at El Paso, and for these reasons same was prejudicial. All of which is more fully set out in defendant's Bill of Exception No. 6, paragraph 2, subdivision B

16.

The Court erred in submitting to the jury that part of paragraph 4 of his main charge, which instructed the jury that it was also the duty of the Texas & Pacific Railway Company upon receiving plaintiff's horses at El Paso to exercise ordinary care to transport same with reasonable diligence over its line of railway to Fort Worth, and to handle same while in transit over said line with reasonable care and dispatch, for the reason that the evidence absolutely failed to show in the least degree, or to such a degree that amounted to any evidence at all, that the defendant, Texas & Pacific Railway Company failed to do those things. All of which is more fully set out in defendants' Bill of Exception No. 6, Paragraph 3, which is here referred to and made a part hereof.

93

17.

The Court erred in submitting to the jury that part of paragraph 4 of his main charge, which instructed the jury that it was the further duty of the Texas & Pacific Railway Company, upon reaching Fort Worth with plaintiff's horses, to transport and deliver same with ordinary care and dispatch to its co-defendant, Missouri, Kansas & Texas Railway Company of Texas, for transportation to their destination, and that the failure of the Texas & Pacific Railway Company to so handle said horses while in its custody would constitute negligence for the reason that there was no evidence introduced at the trial of this cause proving or tending to prove in the least degree, or to such a degree that amounted to any evidence that the Texas & Pacific had not made delivery to the Missouri, Kansas & Texas Railway Company of Texas at Fort Worth, in a prompt and efficient manner. All of which is more fully set out in defendant's Bill of Exception No. 6, Paragraph 4, which is here referred to and made a part hereof.

18.

The Court erred in submitting to the jury the entire paragraph 5 of his main charge for the reason that said part of said main charge was a reiteration of matters previously covered in said charge, and served to especially emphasize the duties of the defendant, Texas & Pacific Railway Company in handling plaintiff's horses, and in especially emphasizing that the failure to handle
94 said horses in those respects would constitute negligence, and for the further reason that said part of said charge placed on defendant the Texas & Pacific Railway Company too great a burden, in that said part of said charge was unfair in unduly emphasizing the question of negligence of the defendant, Texas & Pacific Railway Company, and its liability to plaintiff, thereby rendering said part of said charge prejudicial to said defendant. All of which reasons are more fully set out in defendants' Bill of Exception No. 6, Paragraph 5, Sub-division A.

19.

The Court erred in submitting to the jury that part of paragraph 5 of the Court's main charge which instructed the jury that the failure of the Texas & Pacific Railway Company to provide a suitable car in which to transport plaintiff's horses from El Paso, or its failure to properly inspect the car into which the horses were loaded at El Paso in order to ascertain if same was in a suitable condition, would be negligence, and that the failure of defendant, Texas & Pacific Railway Company to transport plaintiff's horses from El Paso to Fort Worth with reasonable and ordinary care and dispatch would constitute negligence, for the reason that said grounds of negligence, while alleged by plaintiff, were wholly unsupported by the evidence and not raised by any testimony. All of which is more fully set out in defendants' Bill of Exception No. 6, Paragraph 5, Sub-division B-1, which is here
95 referred to and made a part hereof.

20.

The Court erred in submitting to the jury that part of paragraph 5 of his main charge which instructed the jury that upon the issue of the negligence of the defendant, Texas & Pacific Railway Company in failing to inspect the car in which the horses were being transported from El Paso to Fort Worth for the reason that said ground of negligence was not raised by the pleading of plaintiff, and therefore, its submission was prejudicial to the defendant, Texas & Pacific Railway Company. All of which is more fully set out in Defendants' Bill of Exception No. 6, Paragraph 5, Sub-division B-2.

21.

The Court erred in submitting to the jury that part of paragraph 5 of his main charge, which instructed the jury with reference to the negligence of the Texas & Pacific Railway Company in delivering plaintiff's horses at — Worth to the Missouri, Kansas & Texas Railway Company of Texas, for the reason that said issue was not raised by the evidence, and that the submission of same was, therefore, prejudicial to said defendant. All of which is more fully set out in defendants' Bill of Exception No. 6, paragraph 5, sub-division B-3.

96

22.

The Court erred in submitting to the jury part of paragraph 5 of the Court's main charge, which instructed the jury that if they found and believed from the evidence that as a true and proximate result of said negligence on the part of said defendant in one or more of the particulars enumerated therein, that plaintiff's horses were damaged and depreciated in value, for the reason that said part of said charge assumed that the defendant was guilty of negligence in some respects enumerated in said part of paragraph 5 of said charge, which question was one for the jury to determine, and not for the Court, and the submission of same was prejudicial to the defendant. All of which is more fully set out in defendant's Bill of Exception No. 6, Paragraph 5, Sub-division C.

23.

The Court erred in submitting to the jury that part of paragraph 6 of his main charge which instructed the jury that it was the duty of the defendant, Missouri, Kansas & Texas Pacific Railway Company of Texas to exercise ordinary care to handle and transport plaintiff's horses from Fort Worth to Waco, and to deliver the same with like care and dispatch to the consignee thereof, and that the failure on the part of the said defendant to do so would constitute negligence for the reason that the undisputed evidence was to the effect that there was no rough handling of the horses from Fort Worth to Waco, and there were no cripples between said points, and the only damage to said horses between said points was such damage as was due to the failure of the horses to have feed, water and rest, and there being no proof that the horses were damaged by any delay between said points, this matter should not have been submitted to the jury, all of which is more fully set out in defendants' Bill of Exception No. 6, Paragraph 6, which is here referred to and made a part hereof.

97

24.

The Court erred in submitting to the jury all of Paragraph 7 of the Court's main charge, for the reason that said part of said main

charge was a reiteration of matters previously covered in said charge, and served to especially emphasize the duties of the defendant, Missouri, Kansas & Texas Railway Company of Texas, in handling plaintiff's horses, and in especially emphasizing that the failure to handle said horses in those respects would constitute negligence, and for the further reason that said part of said charge placed on defendant, the Missouri, Kansas & Texas Railway Company too great a burden, in that said part of said charge was unfair in duly emphasizing the question of negligence of the defendant, Missouri, Kansas & Texas Railway Company of Texas and its liability to plaintiff, thereby rendering said part of said charge prejudicial to said defendant. All of which reasons are more fully set out in defendants' Bill of

98 Exception No. 6, Paragraph 7 of Sub-division A.

25.

The Court erred in submitting to the jury the grounds of negligence set out in paragraph 7 of his main charge, for the reason that there was either insufficient evidence, or no evidence tending to prove any of said grounds of negligence, and the submission of same was therefore prejudicial to the defendant, all of which is more fully set out in defendant's Bill of Exception No. 6, Paragraph 7 of Sub-division B.

26.

The Court erred in submitting paragraph 8 of his main charge to the jury, for the reason that the matters covered therein were not raised by the pleadings of plaintiff, and the submission of same was prejudicial to the defendants. All of which is more fully set out in defendant's Bill of Exception No. 6, Paragraph 8, which is here referred to and made a part hereof.

27.

The Court erred in submitting to the jury that part of paragraph 8 of his main charge, which instructed the jury that the shipment of plaintiff's horses was an interstate one, and, under the law, the Missouri, Kansas & Texas Railway Company of Texas was forbidden and prohibited from keeping said horses in the cars without un-

99 loading them for feed, water and rest for a longer period of twenty-eight hours consecutively from the time they were loaded by the Texas & Pacific Railway Company at Big Springs, and further instructed the jury that the undisputed evidence showed that said horses were kept confined in the car in which they were being transported without feed, water and rest, and without being unloaded for a longer period of twenty-eight hours, for the reason that said part of said charge is clearly on the weight of the evidence, and further that said part of said charge was not raised by the pleadings of plaintiff, and further that the burden of proof would be on plaintiff to prove that they were not unloaded and that they were kept

confined in the cars for more than twenty-eight hours, which the evidence failed to show, and on account of these reasons, the submission of same was prejudicial to the defendants. All of which reasons are more fully set out in defendants' Bill of Exception No. 6, Paragraph 8, Sub-division A-1-2 and 3.

28.

The Court erred in submitting to the jury that part of paragraph 8 of his main charge, which instructed the jury that if they found and believed from the evidence that as a direct and proximate result of such confinement in said car in excess of the twenty-eight hour period, that said horses were injured and damaged more than they otherwise would have been, they would in such event find for plaintiff against defendant, Missouri, Kansas & Texas Railway Company of Texas, for the reason that said ground of negligence was not raised in the pleadings of plaintiff, and although same had been raised in the pleadings it was not raised by the evidence, and on account of both of said reasons, the submission of same was prejudicial to the defendant. All of which is more fully set out in defendants' Bill of Exception No. 6, paragraph 8, Sub-division B 1 and 2.

29.

The Court erred in submitting to the jury that part of paragraph 8 of his main charge, which instructed the jury with reference to the law governing interstate shipments and the confinement of stock and horses in the cars, for the reason that in said part of said charge, the jury was instructed that under the law governing interstate shipments of stock and horses could not be confined in the cars without being unloaded for feed, water and rest for a longer period than twenty-eight consecutive hours, while as a matter of truth and fact the law is that the shipper or his agent can extend the time within which the cattle may be confined on interstate shipments to thirty-six hours, and even longer if the parties agree, and the submission of the law in the manner stated in said part of said charge was confusing, misleading and prejudicial to the defendant. All of which is more fully set out in defendants' Bill of Exception No. 6, Paragraph 8, Sub-division C.

101

30.

The Court erred in submitting to the jury paragraph 8 of the Court's main charge, which instructed the jury with reference to confining stock and horses in cars for a longer period than twenty-eight hours without unloading for feed, water and rest, for the reason that said charge ignored entirely the plea, and the defendants' evidence introduced thereon, that it was the duty of plaintiff's agent, who accompanied the shipment, to feed, water and rest, unload and reload the shipment of horses en route from El Paso to Fort Worth, and

from Fort Worth to Waco, and that this being true, it was for the jury to determine whether or not plaintiff's agent was guilty of contributory negligence in performing those duties, and for the further reason that said part of said charge instructs the jury that it was not an interstate shipment and gave the law to the jury relating to interstate shipments, whereas as a matter of fact these defendants pleaded an interstate contract, which the plaintiff denied, and said he was not governed by same, and if this be true, the law with reference to intra-state shipments would cover in this case, and in that event the question would be for the jury to determine what would be a reasonable time to confine stock and horses in a car without unloading them for feed, water and rest. All of which reasons are more fully set out in defendants' Bill of Exception No. 6, paragraph 8, subdivision D, which is here referred to and made a part hereof.

102

31.

The Court erred in submitting to the jury paragraph 9 of the Court's main charge for the reason that the wording of said charge allows the plaintiff to recover double damages. All of which is more fully set out in defendants' Bill of Exception No. 6, paragraph 9, which is here referred to and made a part hereof.

32.

The Court erred in submitting paragraph 9 of his said main charge to the jury, for the reason that said part of said charge was confusing and misleading, and was wholly unsupported by the evidence; there being no evidence tending to prove that the defendant, Texas & Pacific Railway Company was guilty of any of the acts of negligence alleged in plaintiff's petition, and for the further reasons that there was no evidence introduced in the case proving, or tending to prove what would be the market value of plaintiff's horses at Waco at the time they should have and would have arrived there, and there was no evidence introduced proving or tending to prove the market value of said horses at the time they did arrive there, excluding the damage occurred by reason of the negligence of the Katy. All of which reasons are more fully set out in defendants' Bill of Exception No. 6, Paragraph 9, Sub-divisions A and B and C.

103

33.

The Court erred in submitting paragraph 10 of his main charge to the jury, for the reason that said part of said charge was confusing and misleading and was wholly unsupported by the evidence. There being no evidence tending to prove that the defendant, Texas & Pacific Railway Company, was guilty of any of the acts of negligence alleged in plaintiff's petition, and for the further reasons that there was no evidence introduced in the case, proving or tending to prove what would be the market value of the plaintiff's horses at Waco at the time they would have and should have arrived there, and there

was no evidence introduced proving, or tending to prove the market value of said horses at the time they did arrive there, excluding the damage that occurred by reason of the negligence of the Katy. All of which is more fully set out in defendants' Bill of Exception No. 6, paragraph 10, which is here referred to and made a part hereof.

34.

The Court erred in submitting to the jury paragraph 11 of his main charge, for the reason that the issue therein submitted to the jury was not raised by plaintiff's pleading, as is more fully set out by defendants' Bill of Exception No. 6, Paragraph 11, which is here referred to and made a part hereof.

35.

The Court erred in submitting to the jury Paragraph 12 of
104 said charge, which instructed the jury that the defendants could not be liable for the inherent vices and propensities which were not caused or contributed to in some way by the negligence of the defendant or defendants, for the reasons; There was no evidence introduced at the trial of this case tending to prove that the damage or injury occasioned by the inherent vices or propensities of the animals were contributed to in any manterial manner by the negligence of the defendant or defendants, and there being no evidence on this matter, it was prejudicial error to submit same to the jury. Second: Said part of said charge assumes that there were damages to the plaintiff's horses, same was upon the weight of the evidence and assumed a fact that the jury should have decided, and the submission of same was therefore prejudicial. All of which reasons are more fully set out in defendants' Bill of Exception No. 6, Paragraph 12, Sub-divisions A and B.

36.

The Court erred in submitting to the jury paragraph 13 of his main charge, for the reason that there was no evidence introduced at the trial of the case proving or tending to prove that the defendant Texas & Pacific Railway Company failed to use ordinary care in handling and transportation of plaintiff's horses from El Paso to Fort Worth, and delivering said horses to the Katy, a company, at Fort Worth, or
105 that it failed to exercise ordinary care in furnishing a proper and suitable car at El Paso, or that it was guilty of negligence in handling said horses between said points, and for these reasons the Court should not leave the jury to determine these matters, there being no evidence on same. All of which is more fully set out in defendant's Bill of Exception No. 6, Paragraph 13, A and B.

37.

The Court erred in submitting to the jury paragraph 13 of his main charge, for the reason that same was misleading and confusing, in

that it did not include the converse of all the grounds of negligence set out in paragraphs 4 and 5 of said charge, in that the jury is instructed in paragraphs 4 and 5 of the Court's main charge that the defendant would be guilty of negligence in failing to inspect the car that it furnished to plaintiff at El Paso, Texas, and further, if the jury so found it was guilty of negligence and believed that the same contributed to cause the injury to plaintiff's horses, they would find for the plaintiff. Whereas, in paragraph 13 of said charge which attempts to set out the converse of the grounds of negligence affirmatively charged, the jury is not instructed with reference to the duty of the Texas & Pacific Railway Company to inspect the car at El Paso, and, as a result, the jury could find and believe that the defendant did inspect the car which plaintiff's horses were loaded into at El Paso, and yet no where in said paragraph 13 are they charged and instructed that if they so found that they would find for the defendant, and leaving the issue submitted in this manner was confusing and misleading to the jury and prejudicial to the defendant. All of which is more fully set out in defendants' Bill of Exception No. 6, Paragraph 13, Sub-division C.

38.

The Court erred in his main charge which was submitted to the jury in failing to include in same an instruction with reference to the duty of the plaintiff or plaintiff's agent who accompanied the shipment from Watrous, New Mexico to Waco, Texas, to unload, reload, feed, water and rest the horses en route, in the event facilities were offered to him by the carriers, and for such damage as was occasioned by the failure of plaintiff or plaintiff's agent to perform the acts described above, the defendant or defendants would not be liable, and this matter having been raised in the pleadings by defendant and by the evidence, all of which is more fully set out in defendants' Bill of Exception No. 6, Paragraph 14 thereof.

39.

The Court erred in failing and refusing to prepare for submission to the jury a correct special charge, or a charge upon the issue of the duty of the plaintiff's agent, with reference to unloading, loading, feeding, watering and resting plaintiff's horses en route from Watrous, New Mexico to Waco, Texas. This issue having been raised in plaintiff's pleading and by the evidence, and said issue not being included in the Court's main charge, to which the Court's attention was directed, and an exception taken to the failure to have said issue included in the Court's main charge, and the request of the defendants at said time to have the Court prepare a correct charge embodying this matter and presented to the jury, it was the duty of the Court under such circumstances to prepare a correct charge upon this issue and present same to the jury, and for the failure and refusal of the Court so to do after his attention had been directed to the failure of the main charge to in-

clude same, and after defendants had taken exception to said omission and had requested the Court to prepare a correct charge upon same, all of which is more fully set out in defendants' Bill of Exception No. 6, Paragraph 15.

40.

The Court erred in failing to include in his main charge anything with reference to the plea of the defendants that plaintiff's suit was barred as a result of plaintiff's failure to file suit within six months after the accrual of his damages, as was provided for in the contract of shipment entered into by plaintiff and the initial carrier at Watrous, New Mexico governing the transportation of plaintiff's horses from that point to Waco, Texas, the final destination. The same being a material and important issue. All of which is more fully set out in defendants' Bill of Exception No. 6,
108 Paragraph 17, which is here referred to and made a part hereof.

41.

The Court erred in failing and refusing to give defendants' special charge No. 3, for the reason that said charge correctly presented the law with reference to the matters contained therein, same not being covered in the Court's main charge and being upon a material and important issue in the case pleaded by the defendants and raised by the evidence. All of which is more fully set out in defendants' Bill of Exception No. 10, which is here referred to and made a part hereof.

42.

The Court erred in failing and refusing to give defendants' special charge No. 4, for the reason that said charge correctly presented the law with reference to the matters contained therein, the same not being covered by the Court's main charge, and same being raised by the pleadings and evidence, and bearing upon a material and important issue in the case. All of which is more fully set out in defendants' Bill of Exception No. 11, which is here referred to and made a part hereof.

43.

The Court erred in failing and refusing to give defendants' special charge No. 5 for the reason that said charge correctly presented
109 the law with reference to the matters contained therein, the same not being covered by the Court's main charge, and same being raised by the pleadings and evidence and bearing upon a material and important issue in the case. All of which is more fully set out in defendants' Bill of Exception No. 12, which is here referred to and made a part hereof.

44.

The Court erred in failing and refusing to give defendants' special charge No. 6 for the reason that said charge correctly presented the law with reference to the matters contained therein, the same not being covered by the Court's main charge, and same being raised by the pleadings and evidence, and bearing upon a material and important issue in the case. All of which is more fully set out in defendants' Bill of Exception No. 13, which is here referred to and made a part hereof.

45.

The Court erred in failing and refusing to give defendants' special charge No. 7, for the reason that said charge correctly presented the law with reference to the matters contained therein, the same not being covered by the Court's main charge, and same being raised by the pleadings and evidence, and bearing upon a material and important issue in the case. All of which is more fully set out in defendants' Bill of Exception No. 14, which is here referred to and made a part hereof.

46.

The Court erred in failing and refusing to give defendants' special charge No. 8, for the reason that said charge correctly presented the law with reference to the matters contained therein, the same not being covered by the Court's main charge, and same being raised by the pleadings and evidence, and bearing upon a material and important issue in the case. All of which is more fully set out in defendant's Bill of Exception No. 15, which is here referred to and made a part hereof.

47.

Even though defendants' special charge No. 8 was incorrect, and did not correctly state the law with reference to the matters therein contained, yet the Court's general charge having failed to include anything with reference to the matters contained in defendants' special charge No. 8, and defendants having excepted to the Court's main charge for said failure to include same, and having taken an exception to the Court's refusal to give its special charge No. 8, it was the duty of the Court under such circumstances to prepare a correct charge, or a charge upon this issue, and to submit same to the jury, and the Court in failing and refusing so to do committed error, which was prejudicial to these defendants.

111

48.

J. A. Templeton, counsel for plaintiff, in his opening argument to the jury made the following statement: "The testimony of the Texas

& Pacific Railway Company's witness, as shown by his deposition, discloses that in the opinion of said witness, the usual and customary time to handle stock from El Paso, Texas to Forth Worth, Texas, was from thirty-six to forty hours, this time including stops for feed, water and rest," which said statement of counsel was objected to and excepted to at the time made, and a request made by the defendants at said time to have the Court instruct the jury not to consider same, for the reason that the statement made by counsel that the time of thirty-six to forty hours included stops for feed, water and rest was outside of the record in that the witness said no such thing, and the argument was therefore, improper and prejudicial, and by reasons of such improper argument on the part of plaintiff's counsel, defendants herein say that a new trial should be granted herein. All of which will more fully appear in *this* defendants' Bill of Exception No. 16, which is here referred to and made a part hereof.

49.

Counsel for plaintiff in his opening argument of the case to the jury, made the following statement: "One of the railway company's witnesses in his deposition testified that the usual and customary time that it required the Texas & Pacific Railway
112 Company to haul stock from El Paso to Fort Worth was from thirty-six to forty hours, including stop for feed, water and rest, and this is about correct for it requires a passenger train twenty-four hours to go this distance, and twelve to sixteen hours' additional time allowed for a freight train to go this distance would make the answer of the witness "thirty-six hours" about correct. Which said statement of counsel with reference to the time that it required a passenger train to go between El Paso and Fort Worth was objected to and excepted to at the time made, for the reason that said argument of counsel on said point was outside of the record, in that there was no evidence introduced at the trial of this case showing what was the usual and customary time, or approximately the time, it required a passenger train to run between El Paso and Fort Worth, and for this reason the argument of counsel complained of was wholly improper and unfair. Upon defendants taking this exception and objection to the argument of counsel complained of, plaintiff's additional counsel, in the presence of the jury made the following statement to the Court and to the jury: "I have got a right to assume approximately the time that a passenger train requires to run between El Paso and Fort Worth, and I have got a right to argue to the jury what that time is," which remarks of counsel were also excepted to by defendants at said time, for the reasons as above stated, and at this
113 time these defendants requested the Court to instruct the jury not to consider any of the remarks made by counsel with reference to the time it required a passenger train to run between El Paso and Fort Worth, which the Court refused to do, and the defendants then and there excepted to said refusal, and for all of these reasons, these defendants say that a new trial should be

granted. All of which is more fully covered by the defendants' Bill of Exception No. 17, which is here referred to and made a part hereof.

50.

Counsel for plaintiff in his closing argument of the case to the jury, made the following statement:

"The testimony of the railway company's witnesses show, without dispute, that plaintiff's horses were held at Big Spring, Texas, for feed, water and rest approximately twenty-four hours, whereas, as a matter of fact they only should be held about five or six hours, which time would have been sufficient for them to have received feed, water and rest, but instead of reloading the horses and shipping them out of Big Spring at the end of five or six hours after they had been unloaded there, the railway company did not do so, but held them at Big Spring for about nineteen hours longer, during which time there were seven or eight freight trains that passed Big Spring coming to Fort Worth that could have carried these horses to Fort Worth, and thus have saved them from being damaged as they were, "which said statement of counsel to the effect that

114 there were seven or eight trains that passed Big Spring coming to Fort Worth that could have carried plaintiff's horses on to Fort Worth, these defendants objected to and excepted to for the reason that there was no evidence to this effect introduced at the trial of the case, and that the argument of counsel was wholly improper, in that he was arguing outside of the record, and assuming facts which were not in evidence, and thereupon plaintiff's counsel in the presence of the jury made the following additional statement to the Court and to the jury: "I have got a right to assume these facts, that there were seven or eight freight trains that passed Big Spring during the time I have mentioned that could have carried these horses on to Fort Worth, and have saved them the damage that they suffered; I have got a right to draw my inference along this line. The railway company has not produced any witnesses to prove that no trains passed Big Spring during the time the horses were there, and I have got a right to assume and argue to the jury that there were at least seven or eight trains that passed Big Spring coming to Fort Worth that could have carried these horses to Fort Worth, and thus obviated the long delay at Big Spring, and have saved these horses from the damage that they did suffer." Which remarks and argument were at that time objected and excepted to by these defendants, for the reasons above stated, and thereupon these defendants made a request of the Court to have the jury not consider same, which request the Court overruled, and the defendants then and there took their bill of exception to said remarks and argu-

115 ment of counsel as complained of for the reasons herein stated. All of which will be more fully shown by these defendants' Bill of Exception No. 18, which is here referred to and made a part hereof.

51.

The Court erred in failing and refusing to grant defendants' motion to order a mistrial herein, and discharge the jury, for the reasons set out in said motion. The same being in effect that the jury by their actions in returning two different verdicts clearly indicated that they were being confused and misled by the Court's charge, and therefore, they were in no position to render an intelligent and impartial verdict. All of which is more fully set out in defendants' Bill of Exception No. 19, which is here referred to and made a part hereof.

52.

A new trial should be granted herein for the reason that the conduct of the Court was improper and prejudicial to the defendants in advising the jury with reference to the kind of verdict that he desired to have from them, after two verdicts had previously been returned to the Court. All of which is more fully set out in defendants' Bill of Exception No. 20 which is here referred to and made a part hereof.

53.

116 A new trial should be granted herein, for the reason that the verdict which the jury finally returned into Court and was accepted by the Court was the result of improper deliberations between the Court and the jury, and was arrived at by the jury when the jury did not have in their possession the Court's main charge, or the defendants' special charge which were originally submitted to the jury by the Court; the said papers mentioned at said time being on the Court's desk and not being taken to the jury room by the jurors. All of which is more fully set out in defendants' Bill of Exception No. 20, which is here referred to and made a part hereof.

54.

The verdict of the jury and the judgment based thereon is improper, wholly irregular and illegal, and is not such a verdict as the law contemplates that a jury shall return between parties litigant, in that the jury were confused and misled by the Court's charge, and by the Court's conversation had with them, and said jury were endeavoring to follow such instructions as they thought the Court had in mind without regard to previous instructions laid down to the jury in the Court's charge and for all of these reasons a new trial should be granted herein.

55.

The verdict of the jury is excessive, and shows the jury did not properly consider and weigh the evidence, but were guilty of bias

117 and sympathy in favor of the plaintiff, in that there was no evidence tending to show that either of the defendants were guilty of the negligence in the respects alleged in plaintiff's petition, or that they were guilty of any acts of negligence pleaded in plaintiff's petition that would justify the amount of damages returned by the jury to be assessed against them, and the testimony of plaintiff's agent, Fred Crowder, who accompanied the shipment the entire distance, being to the effect that he could not say that plaintiff's shipment of horses en route from El Paso to Waco, Texas, was handled by the carriers with any more switching, jerking and bumping than is usually and customarily given similar shipments by the railway companies in Texas for similar distances. By reason of all of which these defendants say a new trial should be granted herein.

56.

The Court erred in taxing the costs of the depositions taken by the Atchison, Topeka & Santa Fe Railway Company, and its sister line, against these defendants, for the reason that in plaintiff's original petition, and in his amended petition he complained of both of the Santa Fe Lines and asked judgment against them and only after all of the defendants, including the Santa Fe Lines, had announced ready for trial, and the jury had been questioned, and the attorneys for the Santa Fe Lines and these defendants had retired to strike the jury, that plaintiff's attorney returned into Court and announced that plaintiff would dismiss as to the Santa Fe Lines, 118 with the understanding that the costs incurred by the Santa Fe Lines would be taxed against plaintiff, and there being on file a deposition of the Texas & Pacific Railway Company at El Paso, Texas, to the effect that plaintiff's horses were in good condition when shipped by the Texas & Pacific from El Paso, it was not necessary for plaintiff to go beyond this and prove these same facts by any other witnesses, and especially in view of the fact that plaintiff has dismissed as to the Santa Fe Lines, with the understanding that the costs of the Santa Fe Lines would be taxed against plaintiff. However, in the judgment rendered herein and written by plaintiff's attorneys, the costs of taking the depositions by the Santa Fe Lines, and in proving the handling of the Santa Fe Lines from Watrous, New Mexico, to El Paso is taxed against the defendants herein, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas. These defendants having objected to the judgment as written up on account of the taxing of the costs against these defendants as complained of herein, and the Court having overruled their objections the judgment as rendered and as now contained in the record, is prejudicial to these defendants for the reasons herein stated, and a new trial should be granted these defendants, or in any event the judgment should be re- 119 formed in such manner as that the costs of the Santa Fe Lines in taking the depositions, on file, will be taxed against the plaintiff instead of against these defendants, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company

of Texas, all of which is more fully shown in defendants' Bill of Exception No. 2, which is here referred to and made a part hereof.

Wherefore, for any and all of the above and foregoing reasons, the defendants request the Court to set aside the verdict of the jury and the judgment based thereon, and to grant these defendants a new trial herein.

THOMPSON & BARWISE,
GEORGE THOMPSON, JR.,
*Attorneys for Defendants T. & P. Ry. Co. and
M., K. & T. Ry. Co. of Texas.*

Filed December 31st, 1915. W. H. Logan, County Clerk.

120 *Order on Defendants' Motion for New Trial.*

Dec. 31, 1915.

No. 14456.

B. LEATHERWOOD

vs.

M., K. & T. & T. & P. Ry. Cos.

Order on Defendants' Motion for New Trial.

December 31st, 1915.

On this day came on to be heard the defendants M. K. & T. Ry. Co. of Texas and the Texas & Pacific Ry. Co., Texas, joint motion for a new trial, and the Court, after hearing said motion and being fully advised in the premises, is of the opinion that said motion should be in all things overruled.

It is therefore ordered, adjudged and decreed by the Court that said motion be, and the same is hereby in all things overruled, to which action and ruling of the Court the defendants then and there, in open Court, duly excepted and gave notice of appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, Texas.

It is further ordered by the Court that said defendants be and are hereby granted 30 days from and after the adjournment of this term of Court in which to prepare Statement of Facts and Bills of Exception herein.

121 *Defendants' Motion for Extending Time to File S. F. and B. of E.*

January 27, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

T. & P. RY. CO., M., K. & T. RY. CO. OF TEXAS.

To Hon. Charles T. Prewett, Judge of said Court:

Come now the defendants, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, in the above entitled and numbered cause, and show to the Court that heretofore the Court granted each of them 30 days from the adjournment of Court, January 1, 1916, to file Bills of Exception and Statement of Facts herein. Each of said defendants further show to the Court that said time is insufficient, and pray the Court to so extend the time for filing their Bills of Exception & Statement of Facts as to give them up to and including March 1, 1916.

THOMPSON & BARWISE,

Attorneys for Defendants T. & P.

Ry. Co., M., K. & T. of T. Ry. Co.

Come now the attorneys for the plaintiff B. Leatherwood, and enter this their agreement to the above extension of time.

TEMPLETON & MILAM &

C. A. WRIGHT,

Attorneys for Plaintiff B. Leatherwood.

Granted,

CHARLES T. PREWETT, *Judge.*

Filed January 27, 1916. W. H. Logan, County Clerk.

122 *Order on Motion of Defendants to Extend Time.*

Jany. 29th, 1916.

No. 14456.

B. LEATHERWOOD

vs.

T. & P. RY. CO. et al.

Defendants' Motion to Extend Time Granted.

Jany. 29th, 1916.

On this day, Court being in session, came on the defendant-Texas & Pacific Railway Company and the Missouri, Kansas &

Texas Railway Company of Texas, motion to extend time for filing their Bills of Exception and Statement of Facts, and it appearing to the Court that there is an agreement between counsel for plaintiff and defendants for so doing;

It is therefore ordered, adjudged and decreed by the Court that the defendants, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, have up to and including the first day of March, 1916, in which to file their Bills of Exception and Statement of Facts in the above numbered and entitled cause.

123 *Defendants' Motion for Extension of Time.*

Feby. 29, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD.

VS.

TEXAS & PACIFIC RAILWAY CO. et al.

Come now the defendants, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, and ask the Court to extend the time for filing the Statement of Facts and Bills of Exception herein to March 10, 1916; the same having been agreed upon by the attorneys for plaintiff and defendants.

This February 29, A. D. 1916.

THOMPSON & BARWISE,
Attorneys for Defendants.

February 29th, 1916. W. H. Logan, County Clerk.

124 *Order on Defendants' Motion to Extend Time.*

Febry. 29, 1916.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. CO. et al.

Defendants' Motion to Extend Time Granted.

February 29, 1916.

On this day came on to be heard the application of defendants herein to extend the time within which to file the Statement of Facts

and Bills of Exception in this cause until March 10th, 1916, and it appearing to the Court that the attorneys for the plaintiff and defendants have agreed to said extension, a copy of their agreement being attached hereto, as follows:

In the County Court of Tarrant County for Civil Cases.

14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. Co. et al.

It is agreed in the above case that the time of filing Statement of Facts and Bills of Exception may be extended to March 10th, 1916.

TEMPLETON & MILAM,
Attorneys for Plff.

THOMPSON & BARWISE,
Attorneys for Defendants.

It is therefore ordered, adjudged and decreed by the Court that the defendants, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas shall have up to and including March 10th, 1916, within which to prepare and file Bills of Exception and Statement of Facts herein.

125 *Defendants' Bill of Exception No. 1.*

March 9, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Bill of Exception No. 1.

Be it remembered, That in due order of pleading, and after plaintiff's first amended original petition had been filed herein, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, filed their special exception No. 1, directed to that part of paragraph No. 2 of plaintiff's amended petition, which reads as follows:

"Said stock were in good condition for shipment when they were delivered to and accepted by the said Santa Fe Companies at Watrous, and if said defendants had discharged their duties in transporting them they would have reached their destination in good condition on, to-wit: the afternoon of October 14th, 1913, when and where said horses could and would have been sold for a good price. Yet, so to handle and transport said horses, defendants negligently failed and refused, and they were guilty of negligence in the following particulars, to-wit: * * * During the night of October 12 this defendant, (T. & P. Ry. Co.) caused said stock to be reloaded into an unsafe and unsuitable car furnished it * * * Said defendant negligently furnished for the transportation of these horses a defective car, and by reason of the defects in said car and the rough handling of same, one of the said horses, a mare, got her foot caught in a hole in said car and she was greatly bruised and crippled and injured."

These defendants objected and excepted to the allegations quoted, for the reason that it was undisputed that the shippers' agent accompanied a shipment of horses from Watrous, New Mexico to Waco, Texas, and was on the train and car at the time it was handled by all of the defendants, and said agent knows full well the manner in which the trains were handled en route, and knows in what manner the car referred to was unsuitable and defective. These facts being true, these defendants except to the allegations quoted, for the reason that they were too vague, indefinite and too general to apprise these defendants as to the particular grounds, or ground of negligence upon which the plaintiff relied. And further that on account of the vagueness and indefiniteness of such allegations concerning the matters raised therein, these defendants would be entitled to adduce proof at the trial, and sufficiently rebut said allegations, and for the further reason that these defendants would be prejudiced by going to trial upon the allegations quoted as they stood.

The Court, after hearing the objections and exceptions of the defendants, overruled same, and the defendants then and there excepted to the ruling of the Court, and herein now tender this, their Bill of Exception No. 1, and ask the Court to approve same, and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND

GEORGE THOMPSON, JR.,

Attorneys for Defendants M., K. & T. Ry.

Co. of Texas and T. & P. Ry. Company.

O. K.,

TEMPLETON.

Approved, 3-9-16.

CHARLES T. PREWETT, *Judge.*

Filed March 9th, 1916. W. H. Logan, County Clerk.

Defendants' Bill of Exception No. 2.

March 9, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Bill of Exception No. 2.

Be it remembered, that in due order of pleading, and after plaintiff's first amended original petition had been filed herein, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas filed their special exception No. 2, directed to that part of paragraph 3 of the plaintiff's amended petition, which read as follows:

"By reason of the defects in said car and the rough handling of same, one of the horses, a mare, got her foot caught in a hole in said car, and she was thus greatly bruised crippled and injured * * * and as a result of such negligence of said defendants five head of said horses were crippled and injured to such an extent as to render them almost worthless."

Defendants, the Missouri, Kansas & Texas Railway Company of Texas and the Texas & Pacific Ry. Company, excepted to the above quoted allegations, for the reason that they were too vague, 129 indefinite and general, in that it was undisputed that plaintiff's agent accompanied the shipment of stock from the point of origin to the point of destination, and, therefore, it was incumbent upon the plaintiff, being in possession of all the facts, to state in his allegations in what particular respects the injuries complained of were inflicted in order to allow these defendants an opportunity to adduce proof to rebut said allegations on the trial of the cause, and for the further reason that to allow the allegations to stand and allow plaintiff to go to trial upon same would be prejudicial to these defendants.

The Court, after hearing said objections and exceptions, overruled same, and then and there these defendants excepted to the action of the Court, and herein now tender this, their Bill of Exception No. 2, and ask the Court to approve same and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND
GEORGE THOMPSON, Jr.,

*Attorneys for Defendants, Missouri, Kansas
& Texas Ry. Company of Texas and Texas
& Pacific Ry. Company.*

O. K.,
TEMPLETON.

Approved, 3-9-16.

CHARLES T. PREWETT, *Judge*.

Filed March 9, 1916. W. H. Logan, County Clerk.

130

Defendants' Bill of Exception No. 3.

March 9, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Bill of Exception No. 3.

Be it remembered, that in due order of pleading, and, after plaintiff's first amended original petition had been filed herein, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, filed their special exception No. 3, directed to that part of paragraph 4 of the plaintiff's amended petition, which reads as follows:

"Instead of so doing they gave said horses a very slow run and negligently kept them confined in the ear without feed and water, and with no opportunity to rest, and for a continuous period of about forty-three hours, whereby said horses were greatly injured and damaged and depreciated in value. * * * The trains carrying said horses on this part of their journey were given a very slow run, and the horses were often negligently laid out and held on sidings for a long period of time, and said trains
131 were also frequently stopped, started and handled with great force and violence, whereby said stock were greatly damaged and injured."

These defendants excepted to the above quoted allegations for the reason that same were too vague, indefinite and general, in that it was undisputed that the plaintiff's agent accompanied this shipment of horses from the point of origination to their destination, and knew full well the manner of handling given them, and the trains upon which they were handled, and these facts being true it was incumbent upon the plaintiff to plead and allege specifically in what the negligence consisted, instead of vaguely and generally pleading same, as plaintiff has done. These defendants further state that it was incumbent upon plaintiff to so plead specifically in order to allow these defendants an opportunity to adduce

testimony at the trial to rebut such allegations. And defendants further raise the objection that if the Court permitted plaintiff to proceed to trial upon said allegations, these defendants would be prejudiced thereby. The Court, after hearing said objections and exceptions of the defendants, overruled same, and these defendants then and there excepted to the action of the Court, and
132 herein now tender this, their Bill of Exception No. 3, and ask the Court to approve same and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,
*Attorneys for Defendants M., K. & T. Ry. Co.
of Texas and T. & P. Ry. Company.*

O. K.,
TEMPLETON.

Approved, 3-9-16,

CHARLES T. PREWETT, *Judge.*

Filed March 9th, 1916. W. H. Logan, County Clerk.

133 *Defendants' Bill of Exception No. 4.*

March 9, 1916.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Bill of Exception No. 4.

Be it remembered, that in the trial of the above entitled and numbered cause while plaintiff was introducing his direct testimony, In the County Court of Tarrant County, Texas, for Civil Cases. plaintiff sought to introduce the depositions of A. J. Biard and F. S. Brooks, to the introduction of which these defendants, the Missouri, Kansas & Texas Railway Company of Texas and the Texas & Pacific Railway Company, duly objected, and thereupon counsel for plaintiff made the following statement with reference to the purposes for which the depositions were offered in evidence.

Mr. Templeton: "The defendants have pleaded that the provision in the initial contract requiring plaintiff to bring suit within six months after the happening of the damages, and the failure of plaintiff to bring his suit within six months as a bar to his recovery. This testimony is offered for the purpose of showing that the two Texas Companies received notice of claim of damages through the

Santa Fe Company, which company was originally notified by the plaintiff, and that they held the claim for six months, and
134 that this action of the defendants and its agents constitute a waiver if the six months' provision by defendants."

These defendants objected to the testimony of said witnesses, as contained in their depositions, or any part of same, for the reason that the initial contract executed at Watrous, New Mexico contained the provision that none of the provisions of said contract could be waived, except by a general officer of the Company, and then only in writing. And that said testimony sought to be introduced was irrelevant, immaterial and prejudicial to the interest of defendants by reason of the fact that the written contract referred to contained the condition that none of its provisions could be waived except by a general officer of the Company, and then only in writing, and the testimony sought to be introduced was oral testimony to rebut the terms and conditions of a written contract. And defendants further objected to the introduction of said testimony, or any part of same, for the reason that it was the purpose of plaintiff to show a waiver of the six months' provision pleaded by acts and deeds of the defendants' employees, when as a matter of fact the only way that said contract could be waived, or changed or modified was by a general officer of the Company and in writing, and for this reason said testimony was irrelevant, immaterial and prejudicial, and confusing to the minds of the jury, for all of which reasons, these defendants objected to said testimony,
135 or any part of same, being introduced in evidence.

The Court, after hearing said objections, overruled same, and the defendants then and there excepted to the action of the Court in so doing, for the reasons herein stated, and herein now tender this, their Bill of Exception No. 4, and ask that the Court approve same and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,

*Attorneys for Defendants M., K. & T. Ry. Co.
of Texas and T. & P. Ry. Company.*

Approved, 3-9-16.

CHARLES T. PREWETT, *Judge.*

O. K.,

TEMPLETON.

Filed March 9, 1916. W. H. Logan, County Clerk.

136

Defendants' Bill of Exception No. 5.

March 9, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Bill of Exception No. 5.

Be it remembered, That in the trial of the above entitled and numbered cause, after plaintiff had introduced his direct testimony, and after the defendants had introduced their testimony, putting on the stand, among other witnesses, Mr. G. P. Butts, the conductor who was cross-examined by plaintiff's attorney, that on rebuttal the plaintiff sought to introduce certain parts of the deposition of G. P. Butts to their introduction of which these defendants objected for the reason that Butts had been on the stand, and had been subjected to cross examination by the plaintiff with reference to the handling of this shipment, and that said Butts is now present in the Court room, and is available to plaintiff for cross examination to any further length that plaintiff's attorneys may desire. And defendants stated to the Court at said time, that if plaintiff wished to introduce testimony of the witness Butts, which plaintiff claims is contradictory, then the proper way to introduce same would have been to have put the witness Butts on the stand and asked him whether or not the statement was true and correct as contained in his deposition, and whether or not he had made it, and then in the event the witness stated that said testimony was not true and correct, or that he did not make it, to introduce that part of the statement or deposition in evidence for the purpose of impeaching said witness Butts, and defendants further objected to the reading of the deposition of Butts by plaintiff's attorney when the said witness was present in the Court room, for the reason that same was prejudicial to the interest of these defendants, was irrelevant, immaterial and confusing to the minds of the jury.

The Court, after hearing said objections, overruled same and permitted the plaintiff to introduce that part of the deposition of Conductor Butts, which was the exhibit to said deposition, and is as follows:

"EXHIBIT "A."

The Texas & Pacific Railway Company Conductor's report of train No. — Ex. & Ex. left 859 at 2:20 a. m. 10-12-1913, engine 380,

Engineer Schubert, Conductor George P. Butts. Bound E. over R. G. Division, Fireman Cleveland, Arrived 665 at 1 p. m. 10-12-1913, Brakeman J. H. Shaw, G. C. Woodward.

Road Initial A. T. & S. F. No. 57289 Kind stock Car weight thirty tons from 859 to 665, horses Waco loaded 1 a. m. 10-12-1913, two crippled when loaded at 8-59 20 min. for bills no rough handling or delay, man in charge of horses refuses to sign 1371."

138 To which action of the Court in admitting said testimony, these defendants excepted for the reasons herein stated, and at said time these defendants asked and requested the Court to instruct the jury that the deposition of Conductor Butts was admissible for the purpose of impeachment only, and these defendants at said time requested the Court to limit said testimony for the above purpose, which request the Court then and there overruled and permitted the deposition of Conductor Butts to be read before the jury, without restrictions, to which action of the Court the defendants then and there further excepted, and for the reasons contained herein, *herein* now tender this their Bill of Exception No. 5, and ask the Court to approve same and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,
*Attorneys for Defendants M., K. & T. Ry.
of Texas and T. & P. Ry. Companies.*

Approved, 3-9-16.

CHARLES T. PREWETT, *Judge.*

139 This bill should be allowed with the following explanation, to-wit: While this witness was on the stand testifying orally for defendants, he was interrogated and he testified both on direct and cross examination, with reference to having given his deposition, and with reference to statements made therein. His testimony will appear in full in the Statement of Facts herein filed. After the defendants had concluded their testimony, plaintiff offered and read in evidence the exhibit to the deposition of which complaint is made in this bill—the defendants thereupon recalled the witness Butts, who then testified orally as set out on Pages 78 and 79 of the Statement of Facts.

O. K.
TEMPLETON.

Filed March 9th, 1916. W. H. Logan, County Clerk.

Defendants' Bill of Exception No. 6.

March 9, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

T. & P. RY. COMPANY et al.

Defendants' Bill of Exception No. 6 to the Court's Main Charge.

Be it remembered, That after the evidence in the above case had been concluded, and before any charge had been submitted to the jury, and before the argument had commenced, the Court presented defendants' attorney his main charge that he was preparing to submit to the jury, and at that time the defendants, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, gave to the Court and to plaintiff's attorney several reasons and objections concerning said main charge and why same, and certain parts of same should not be submitted.

1. Objection is made to the Court submitting any charge to the jury at all, for the reason that the Court should grant the peremptory instruction of these defendants for the following reasons, to wit:

(a) The contract executed at Watrous, New Mexico, and entered into by plaintiff and the Santa Fe lines, the initial carrier, covered the transportation of plaintiff's horses from Watrous, New Mexico, to Waco, Texas, provided that suit for any damages arising from said shipment, which was in October, 1913, should be brought within six months after the occasioning of the injuries. This contract and provision having been plead by these defendants, and having been supported by the evidence, it is the duty of the Court to grant a peremptory instruction for the reason that said contract is the only legal and binding contract governing the carriage of the horses from Watrous, New Mexico to Waco, Texas, notwithstanding the execution of subsequent contracts by these carriers, which contracts are null and void.

(b) Plaintiff has failed to introduced any evidence tending to show or prove that the horses were damaged as a result of the negligence of these defendants, or tending to prove that these defendants were guilty of negligence as alleged in said petition.

(c) Suit having been instituted in March, 1915, upon an express contract, and trial being had upon an implied contract, the petition covering same being filed on December 21st, 1915, the two years' statute of limitations having been plead by these defendants, the suit of plaintiff is now barred by the two years' statute of limitation, and peremptory instruction should be given.

2. The Texas & Pacific Railway Company, defendant, objects to paragraph four of the said main charge, and especially that
142 part of same which instructs the jury that it was the duty of the defendants, Texas & Pacific Railway Company, upon receiving plaintiff's car of horses at El Paso, to exercise ordinary care to see and ascertain that the car in which they were transported was in reasonably good and suitable condition for the carriage of said stock, and further, it was the duty of said company to exercise ordinary care to provide and furnish for the transportation of said stock a car which was in reasonably good condition and suitable for that purpose, and that failure so to do would constitute negligence, for the following reasons:

(a) The undisputed evidence shows that the car in which plaintiff's horses were loaded at El Paso was the same car into which the horses were loaded at the point of origin, Watrous, New Mexico, and the undisputed evidence of plaintiff himself shows that he examined the car at Watrous, New Mexico, and that so far as he could determine the car was in good condition, and there being no evidence from any witness proving or tending to show that the car at the time the horses were loaded into same at El Paso was in any other condition except the condition in which it started from Watrous, New Mexico, it will be presumed in law in the absence of proof to the contrary that the car into which the horses were loaded at El Paso continued to be in the same condition at El Paso as it was at point of origin, Watrous, New Mexico. And, therefore, the defendant, Texas & Pacific Railway Company, says that it will prejudice its rights to instruct the jury with reference to this
143 ground of negligence which is not raised by the proof or the evidence.

(b) Said part of said charge is objectionable for the reason it is confusing and misleading and embraces a reiteration and lays undue emphasis upon the duty of the Texas & Pacific Railway Company to provide a safe and suitable car at El Paso, Texas, into which plaintiff's horses may be loaded for the reason that the first five lines of said paragraph four, ending with "Stock" instruct the jury that it was the duty of the defendant to exercise ordinary care to see and ascertain that the car in which they were transported from El Paso was in a reasonably good and safe condition for the carriage of such stock, while the rest of the sentence simply repeats and reiterates that duty and instructs the jury nothing further with reference to the duty that in law the jury is entitled to know, and the reiteration of said duty in the rest of the sentence complained of is prejudicial to the defendant, Texas & Pacific Railway Company, for the reason herein stated, and this defendant now asks the Court to omit the rest of the sentence complained of at the beginning of paragraph four, starting on the fifth line and ending on the ninth line with the word "negligence."

3. Defendant, Texas & Pacific Railway Company objects to that part of paragraph four of said charge, which instructs the
144 jury that it was also the duty of the said defendant, upon receiving said stock at El Paso, to exercise ordinary care to transport same with reasonable diligence over its lines of railway to

Fort Worth, and to handle same, while in transit over said line, with reasonable care and dispatch, for the reason that while the pleading of plaintiff complains of this ground of negligence, yet the evidence introduced absolutely fails to show, in the least degree, or to such degree that amounts to any evidence at all, that the defendant, Texas & Pacific Railway Company, failed to use ordinary care to transport same, or reasonable diligence over its lines of railway to Fort Worth, or to handle same while in transit over said line with reasonable care and dispatch, in this, the only evidence introduced by plaintiff tending to prove this allegation of negligence is evidence taken in the deposition of Fred Crowder, which evidence is to this effect; that it has been a long time since he accompanied the shipment of horses and he could not state where the starts and stoppings and lay outs occurred, and that he could not say that on this trip from El Paso to Fort Worth there was any more jerking or bumping or switching than was usual or customarily done by railroad companies in Texas in handling like shipments for similar distances, and the said evidence of Fred Crowder fails to prove this ground of negligence as submitted by the Court, and this defendant says it will be prejudicial error for the Court to submit this ground of negligence upon which the jury is instructed they may find against this
145 defendant because there has been introduced insufficient evidence to authorize same to be submitted to the jury, and for the further reason there had been no evidence at all introduced to warrant its submission to the jury.

4. Defendant, Texas & Pacific Railway Company, further objects to paragraph four of said charge which instructs the jury that it was further the duty of the Texas & Pacific Railway Company, upon reaching Fort Worth with said stock, to transfer and deliver same with ordinary care and dispatch to its co-defendant, the Missouri, Kansas & Texas Railway Company of Texas for transportation to their destination, and that the failure of the Texas & Pacific Railway Company to so handle said stock while in its custody would constitute negligence, for the reason the only evidence introduced by plaintiff tending to show the handling given plaintiff's horses between El Paso and Fort Worth, is in the deposition of Fred Crowder, plaintiff's agent who accompanied the shipment of horses between said points, and no where in said Fred Crowder's deposition does he state particularly, or attempt to describe the manner and the time in which the Texas & Pacific Railway Company delivered or transferred plaintiff's horses to the Missouri, Kansas & Texas Railway Company of Texas, nor is there sufficient evidence in the testimony of Fred Crowder to warrant the Court in submitting this ground of negligence, nor is there any evidence to warrant its submission to the jury; and for the further reason that the un-
146 contradicted evidence of all the conductors or employees who handled the train from El Paso to Fort Worth being to the effect that the train was handled through without any rough handling, unnecessary switching, jerking or bumping, but was handled in the usual and customary manner, there being absolutely

no evidence to the contrary introduced by plaintiff and submission of this issue to the jury is wholly prejudicial to this defendant.

5. Defendant, Texas & Pacific Railway Company, objects to the submission of the entire paragraph five of said charge, for the following reasons:

(a) The Court, in paragraph one of the charge, defined ordinary care, and instructed the jury that failure to use such care would constitute negligence. In paragraph two of said charge the Court defined negligence, and in paragraph three the term proximate cause. In paragraph four of said charge the Court instructed the jury fully with reference to the duty of the Texas & Pacific Railway Company with reference to handling this shipment, and if any further charge is necessary, the Court should submit to the jury a further paragraph that if the jury found and believed from the evidence that the defendant failed to use ordinary care, and was guilty of negligence, as that term is defined in paragraph two of the charge, and that said negligence was the proximate cause, as that term is defined in paragraph three of said charge, of the damages, if any, to plaintiff's horses en route from El Paso to Fort Worth, that the jury

147 would find in favor of the plaintiff against the defendant Texas & Pacific Railway Company in accordance with the measure of damages submitted. Instead of submitting the matter in this way, which would inform the jury fully with reference to the manner in which they could find against the railway company, and which would be a fair charge, provided same was warranted in being submitted, to both plaintiff and defendant, paragraph five of said charge proceeds to reiterate and repeat the grounds of negligence for which the defendant, Texas & Pacific Railway Company would be liable to the plaintiff, as has been heretofore given to the jury in paragraph four of said charge, and the reiteration and repeating of said grounds of negligence in paragraph five of said charge unduly emphasizes the question of negligence of the defendant and its liability to plaintiff and lays too great a burden upon the Texas & Pacific Railway Company, and, therefore, is prejudicial to its interests, and the defendant Texas & Pacific Railway Company requests the Court not to submit paragraph five in the manner in which it is done in said charge, but to change same in the manner in which this defendant has indicated herein, or in some other suitable manner that would obviate the objections raised herein.

(b) Defendant further objects to the grounds of negligence raised in paragraph five of said charge being submitted to the jury on the following grounds, to-wit:

1. By giving as negligence of the Texas & Pacific Railway
148 Company its failing to provide a suitable car in which to transport said stock, and its negligence in failing to properly inspect the car in which the horses were being transported in order to ascertain that the same was in suitable condition; the negligence of the defendant in failing to transport said horses from El Paso to Fort Worth with reasonable and ordinary care and dispatch, and on account of the negligent delays and negligent handling between El Paso and Fort Worth, for the reason that said grounds of neg-

ligence, while alleged by plaintiff, are wholly unsupported by the evidence, in that the only evidence introduced by plaintiff tending to prove these allegations is the evidence of Fred Crowder, which witness states he cannot remember the handling given said horses between El Paso and Fort Worth, and that he did not know that between these points the horses were handled with any more jerking and bumping and switching than is usually and customarily given similar shipments by railroad companies of Texas over like distances, and, for this reason, said grounds of negligence have not been proved, and the proofs raised by the evidence are insufficient and amount to no evidence at all, and this defendant objects to said charge being submitted to the jury.

2. This defendant specially excepts to the ground of negligence submitted to the jury that it negligently failed to inspect the car in which the horses were being transported from El Paso to Fort Worth for the reason that said ground of negligence is not raised by the pleading of plaintiff, and it is prejudicial error for the
149 Court to submit a ground of negligence not raised by the pleadings.

3. Defendant specially objects to that part of paragraph five which instructs the jury with reference to the negligence of the Texas & Pacific Railway Company in delivering said stock at Fort Worth to its co-defendant as soon as it should have been delivered to said co-defendant, for the reason of said negligent delays of the Texas & Pacific Railway Company, if they found any; for the reason that there is absolutely no evidence introduced by plaintiff in this case, or by any of the parties to this case, which warrant the Court in submitting to the jury this issue of negligence, and the submission of same without being supported by evidence is prejudicial error, and of which this defendant complains.

(c) Defendant especially objects to that part of paragraph five which instructs the jury that if they further find and believe from the evidence that as a direct and proximate result of said negligence on the part of said defendant in one or more of the particulars above enumerated, these stock were damaged and depreciated in value, for the reason that said part of said charge assumes that the defendant was guilty of negligence in some of the respects enumerated in said part of paragraph five of said charge, and said assumption is wholly unwarranted by the evidence introduced in this case and the giving

of said part of said charge as complained of herein is prejudicial to this defendant.
150

6. The defendant, Missouri, Kansas & Texas Railway Company of Texas objects to the submission of paragraph six of said charge which instructs the jury that it was the duty of it to exercise ordinary care to handle and transport plaintiff's horses from Fort Worth to Waco, and to deliver same with like care and dispatch to the consignee thereof, and that failure on the part of said defendant to do so would constitute negligence; for the reason that while it is true that plaintiff complained of this ground of negligence in his petition, yet the only proof introduced by plaintiff and the only evidence in the case with respect to the proof of any damages to the

horses on the run from Fort Worth to Waco, is the evidence of Fred Crowder, who stated that there was no rough handling of the horses from Fort Worth to Waco, and that there was no cripples between said points, and that the only damage to said horses between said points was such damage as was due to the failure of the horses to have feed, water and rest, and there being no proof that the horses were damaged by any delay between said points, then, though this ground of negligence was pleaded, this defendant objects to the Court submitting said issue, or any issue of negligence on the part of the said Missouri, Kansas & Texas Railway Company of Texas, for the reason that there is insufficient evidence, or no evidence to warrant the Court to submit same to the jury.

151 7. Defendant, Missouri, Kansas & Texas Railway Company of Texas objects to paragraph seven of said charge for the following reasons:

(a) In paragraph one of said charge the Court defines ordinary care and instructs the jury that the failure to use such care would constitute negligence. In paragraph two of said charge the Court defines negligence, and in paragraph three of said charge the Court defines proximate cause, and in paragraph six of said charge the Court instructs the jury that it was the duty of the defendant Missouri, Kansas & Texas Railway Company of Texas, upon receiving plaintiff's stock at Fort Worth, to exercise ordinary care to handle and transport the same over its line of railway from Fort Worth to destination at Waco, and to there deliver same with like care and dispatch to the consignee thereof, and a failure on the part of said defendant so to do would constitute negligence on this defendant, and says that the Court, instead of submitting the matter as he has in paragraph seven, should instruct the jury that if they find and believe from the evidence that the defendant Missouri, Kansas & Texas Railway Company of Texas was guilty of such negligence as set out in the preceding paragraph six, and that such negligence, if any, was the proximate cause of the damages, if any, to plaintiff's horses, then they would find for the plaintiff against defendant, and assess his damages as directed in the paragraph with reference to said damages; and this defendant says that the submission of paragraph seven, as it is, is simply a repetition and reiteration

152 of the duty of the said Katy as set out in paragraph six, and lays undue emphasis upon the grounds of negligence for which the said Katy would be liable, and lays upon the said Katy too great a burden, and more than the law allows to be placed upon defendant in similar circumstances, and on account of the undue emphasis and reiteration of said part of said charge, this defendant says same is prejudicial to its interests.

(b) This defendant objects to any of the grounds of negligence contained in paragraph seven of said charge being submitted to the jury for the reason that there is either insufficient evidence, or no evidence tending to prove any of said grounds of negligence, in that the only testimony in the case is that of Fred Crowder, who did not testify concerning the grounds of negligence raised in said part of

said charge in such a way as would warrant the Court in submitting the same.

8. Defendants, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, object to entire paragraph eight being submitted to the jury for the reason that the matters covered therein were not raised by the pleadings of plaintiff and these defendants having not been apprised that the plaintiff would seek to hold these defendants liable for the matters raised in paragraph eight, produced no proof of same, and the submission of the matters contained therein by the Court in the absence of pleadings by the plaintiff is prejudicial error.

153 (a) These defendants further object to said paragraph eight which instructs the jury that the shipment of stock in question was an interstate shipment and under the law the Missouri, Kansas & Texas Railway Company of Texas was forbidden and prohibited from keeping said stock in the cars without unloading them for feed, water and rest for a longer period than twenty-eight hours consecutively from the time they were loaded by the Texas & Pacific Railway Company at Big Spring, and further instructs the jury that the undisputed evidence shows that said stock were kept confined in the car in which they were being transported without feed, water and rest, without being unloaded, for a longer period than twenty-eight hours, for the reason:

1. That said part of said charge is clearly on the weight of the evidence, and for this reason is prejudicial to the defendant.

2. Said part of said charge was not raised by the pleadings, and the submission of same, not being raised by the pleadings, is prejudicial error.

3. The burden of proof would be on the plaintiff to prove that they were not unloaded, and that they were kept confined in the cars for more than twenty-eight hours, and, even though had such allegations been made, the proof clearly fails to show that said stock were not unloaded between Big Spring and Fort Worth, and further

154 clearly fails to show that said horses in said car were kept confined and were without feed, water and rest and without being unloaded for a longer period of time than twenty-eight hours, and for these reasons the submission of this part is prejudicial error.

(b) These defendants further object to that part of paragraph eight of said charge which instructs the jury that if they find and believe from the evidence as direct and proximate result of such confinement in said car in excess of the twenty eight hour period, said stock were injured and damaged more than they otherwise would have been they would, in such event, find for plaintiff against the defendant, Katy Company, for the reasons:

1. That said ground of negligence is not raised in the pleadings.

2. For the reason that said negligence, even though had it been raised in the pleadings, is not supported by any evidence, or is supported in insufficient evidence, and the submission of same for all of such reasons is prejudicial to defendants.

(c) Defendant further objects to that part of paragraph eight

which seeks to instruct the jury with reference to the law governing interstate shipments, and tells the jury it is the law that stock confined in cars cannot be kept in same without unloading for feeding, resting and watering, for a longer period than twenty eight consecutive hours, for the reason that same is not the law, the law
155 being that the shipper or his agent can extend the time within which the cattle may be confined in interstate shipments to thirty six hours, and even longer, if the parties agree, the horses being shipper's horses, not the government's horses, and the shipper being entitled to do with them what he pleases, and to handle them as he pleases, and not feed and water them for five days if he does not so desire, and the submission of the law in this manner is confusing and misleading and prejudicial to the defendant.

(d) Defendant further objects to paragraph eight which instructs the jury that it is negligence for the defendant to keep the stock in this shipment in the cars longer than twenty eight hours without unloading for feed, water and rest, which is uncontradicted by the evidence, so the charge states, for the reason that said charge ignores entirely the plea and the defendants' evidence introduced thereon, that it was the duty of the plaintiff's agent who accompanied the shipment to feed, water and rest, unload and reload the shipment of horses en route from El Paso to Fort Worth and from Fort Worth to Waco, and if this was plaintiff's agent's duty, and proper facilities were afforded to him by the defendant for so doing, then, even if the horses were confined in the cars for a longer period than twenty eight hours and plaintiff's agent failed in his duty with reference to loading, unloading and reloading the stock, the issue of contributory negligence of plaintiff's agent should be submitted to the jury, and the
156 jury should be instructed thereupon by the Court for this reason: said charge is improper, and is prejudicial to defendant, and defendant further objects to same for the reason that the Court states that this is an interstate shipment, and gives the law to the jury relating to interstate shipments, whereas, as a matter of fact these defendants pleaded an interstate contract which plaintiff denied, and stated he was not governed by the interstate contract, and, if this be true, the law with reference to intra-state shipments would govern in this case, and, in that event, the law with reference to intra-state shipments in holding horses in cars is a matter for the jury to determine, as the law in Texas is that the Railway Company shall not keep stock confined in the cars for a longer period than is reasonable.

9. Defendant Texas & Pacific Railway Company objects to paragraph nine of said charge, for the reason that the wording of said charge allows the plaintiff to recover double damages in this, that the jury is instructed if they find the Texas & Pacific Railway Company guilty of negligence, they will estimate such damage so found with the difference between the market value of such stock at Waco at the time they should have arrived there, but for the negligence of said defendant, if any, and the market value of said stock at the time and in the condition they did arrive there, including such damage, if any, as you find resulted to the said stock by the defendant, Missouri,

157 Kansas & Texas Railway Company of Texas, for the following reasons:

(a) Said charge is confusing and misleading and would tend to make the jury believe that they could find against defendant Texas & Pacific Railway Company for the entire damage on said trip from El Paso to Waco, and further in said charge they could find against the said Katy Company for the negligence of the said Katy Company between Forth Worth and Waco, Texas.

(b) Defendant further objects to said charge for the reason that there has been no evidence introduced on the trial of this case showing what would be the market value of said stock at Waco at the time they should have arrived there, and there has been no evidence introduced showing or tending to show the market value of said stock at the time they did arrive there excluding the damage that occurred by reason of the negligence of the Katy Railway Company, and therefore, there being no evidence with reference to the elements of damage submitted in this part of the charge, the giving of same is confusing and misleading to the jury, and in no way assists them in arriving at a true and correct measure of damages as disclosed by the evidence, and is prejudicial to the defendant.

(c) Defendant further objects to the submission of said charge for the reason that there is no evidence in this case to show that the defendant Texas & Pacific Railway Company was guilty of any of the grounds of negligence alleged in plaintiff's petition, and
158 the submission of measure of damages on grounds of negligence not raised by the evidence is prejudicial to defendant.

(d) Defendant further objects to said charge for the reason that it is misleading and confusing for the reason that one part of said charge instructs the jury with reference to market value of said stock at Waco and the other part of said charge instructs the jury with reference to the value of said stock omitting the word "market" value.

Upon this objection being made, the Court, to meet same, offered to insert the word "market" before the word "value" in the latter part of said paragraph of said charge, and defendant, after the exception made by the attorney for plaintiff, stated to the Court and plaintiff's attorney that it was his duty to object to the charge of the Court as it was submitted to the jury, and requested the Court to instruct him which way the Court was going to submit it, as he desired to take exception in either event, and now asks the Court which way he is going to submit it, so he can make final exception to it. The Court thereupon instructed plaintiff's attorney and defendant's attorney he would submit the charge with market value at both places, and thereupon the defendant withdrew its objection last named as to market value being at one place and the omission of same in another place, but in no way waives its objection to said charge as previously outlined herein.

159 10. Defendant, Missouri, Kansas & Texas Railway Company of Texas objects to paragraph ten of said charge for the following reasons, being the same reasons and objections as hereto-

tofore raised by the defendant Texas & Pacific Railway Company to paragraph nine of said charge, which is in effect upon the same measure of damages, and this defendant incorporates said objections as applicable to paragraph ten, and make the same objections to said paragraph ten.

11. Defendant objects to paragraph eleven of said charge for the reason that the issue therein submitted to the jury was not raised by the plaintiff's original petition and defendants are not liable therefor.

12. Defendant objects to paragraph twelve of said charge, and that part of same which instructs the jury that the defendants would not be liable for the inherent vices and propensities which was not caused or contributed to in some way by the negligence of the defendants, or defendant, as the case may be, for the following reasons:

(a) There has been no evidence introduced in the trial of this case tending to prove or proving that the damage or injury occasioned by the inherent vices or propensities of the animals were contributed to in any material manner by the negligence of the defendant, or defendants, and there being no evidence on this matter it is prejudicial error to submit same to the jury.

160 (b) Defendant objects to said part of said charge which instructs the jury that in estimating the damage to plaintiff's stock, in the event they find for plaintiff against one or both of said defendants, you will exclude from such estimate any and all such damage as you may find resulted to said stock solely from their inherent vices and propensities, if any such there was, for the reason that said part of said charge assumes there were damages to the stock and defendants having denied same, there being no evidence upon the matter in both ways, and same is upon the weight of the evidence and assumes a fact that the jury should decide and is, therefore, prejudicial for the Court to submit the same. And the defendants with reference to the matter incorporated in paragraph twelve of said charge, objects to same for the reason that the jury is not charged or given any definition of inherent vices or propensities and the giving of said charge as herein contained is misleading and confusing and the defendant here and now asks the Court and plaintiff's attorney to prepare a definition on inherent vice in order that the jury may understand what the same is, or of what it consists, in order that they may intelligently follow the charge given to them in paragraph twelve, and the defendants except to said part of said paragraph twelve of the Court's main charge for its failure to contain the definition of inherent vice or propensities of animals. The defendant further excepts to said paragraph twelve of the Court's

main charge for its failure to include and inform the jury
161 that the defendants are not liable for such damage or damages, if any, that the horses suffered en route from El Paso to Waco, Texas, that was occasioned by the result of the usual and customary handling given like shipments of horses and cattle and stock for like distances, and the defendants here and now call this to the attention of the Court and request the Court and plaintiff's attorney to insert in said main charge a provision of this nature and except to the failure of said charge to contain same.

13. (a) Defendant objects to the Court submitting paragraph thirteen of said charge for the reason that there is no evidence raised at the trial of this case tending to show that the defendant Texas & Pacific Railway Company failed to use ordinary care in the handling and transportation of plaintiff's horses from El Paso to Fort Worth and delivering said horses to the Katy Company at Fort Worth, or that it failed to exercise ordinary care in furnishing a proper and suitable car at El Paso, and that it was guilty of negligence in handling said stock between said points, for these reasons:

(b) The Court should not leave the jury to determine these matter-, there being no evidence on same, and this defendant objects to its submission.

(c) Defendant further objects to said part of said charge in that the same is misleading and confusing to the jury, in that same does not include the converse of all grounds of negligence set out
162 in paragraphs four and five of said charge, in that the jury is instructed in paragraphs four and five of the Court's main charge that the defendant would be guilty of negligence in failing to inspect the car that it furnished to plaintiff at El Paso, Texas, and if the jury so find it was guilty of negligence, and that the same contributed to cause the injury to plaintiff's horses, they would find for the plaintiff, and nowhere in said paragraph thirteen of the Court's main charge, in which the Court attempts to set out the converse of grounds of negligence affirmatively charged on, is this matter touched upon or given and the jury could find and believe that the defendant did inspect the car which plaintiff's horses were loaded into at El Paso, and yet no where in said paragraph thirteen are the jury instructed that if they so find, they would find for the defendant, and the jury having been told in paragraph four and paragraph five if they found that they failed to inspect said car, and failed to provide a suitable car, they would be guilty of negligence, and failing to state the converse in paragraph thirteen would be misleading and confusing to the jury.

14. Defendant further excepts to the Court's main charge for the reason that same fails to instruct the jury with reference to the duty of the plaintiff or plaintiff's agent who accompanied the shipment from Watrous, New Mexico, to unload, reload, feed, water and rest the stock en route, in the event facilities were afforded him by the carriers, and for such damage as was occasioned by the failure of plaintiff or plaintiff's agent to perform the acts described above the defendant, or defendants, would not be
163 liable. This matter having been raised in the pleading of defendants, and having been raised by the evidence, the same should be submitted to the jury in the Court's main charge, and the defendant here and now excepts to said charge for its failure to include a charge upon this issue.

15. Defendant further objects to the entire main charge for its failure to include any charge with reference to the duty of plaintiff, or plaintiff's agent with reference to loading, unloading, feeding, watering and resting the horses in this shipment en route, this matter having been raised in defendant's pleading, and having been

raised by the evidence in this case, and the defendants here now tells the Court that exception having been taken to the refusal of the Court to include this matter in his main charge, and the Court having refused to give any of defendant's special charges on same, it is the duty of the Court to prepare a correct charge embodying this matter and present same to the jury.

16. The Court's charge is erroneous because it assumes that the initial contract, which these defendants pleaded, and which was executed at Watrous, New Mexico, covered the shipment from that point to Waco, Texas, was either invalid, or that the provisions of same that these defendants pleaded were invalid, or had been

164 waived, for the reason that said contract and certain of its provisions have been pleaded by these defendants and the Court is not authorized in assuming as a matter of law that the contract is void or illegal, or certain of its provisions are void or illegal, or had been waived, for the reason that said facts are questions for the jury to determine and not for the Court, and defendants object to the submission of said charge in the manner framed, for the reasons herein set out, same were prejudicial to these defendants.

17. Said charge is erroneous, in that it fails to include in same anything with reference to the plea of these defendants that plaintiff's suit was barred as a result of plaintiff's failure to file suit within six months after the accrual of his damages, as was provided for in the initial contract of shipment entered into by the plaintiff and the initial carrier at Watrous, New Mexico, and governing the transportation of plaintiff's horses from that point to Waco, Texas, the final destination. These defendants say that said issue has been pleaded and is a material and important one, and that same should be at least submitted to the jury for them to say whether or not same is reasonable, unreasonable, or whether or not same has been waived. And these defendants say that the giving of the Court's charge in the manner framed is prejudicial to them for the reasons herein stated.

165 18. Said charge is erroneous for the reason that same ignores the issues raised in defendants' pleadings, with reference to the provisions of the subsequent contracts executed at El Paso, Texas by the T. & P. Railway Company, and in Fort Worth, Texas by the Missouri, Kansas & Texas Railway Company of Texas, with reference to the duty of plaintiff's agent who accompanied the shipment to feed, water, rest, load, and unload the horses while en route, and these defendants say that said issue should at least be submitted to the jury for them to determine whether said provision pleaded is reasonable or unreasonable, and whether or not same was waived and these defendants say that the giving of such charge in the manner permitted is prejudicial to these defendants for the reasons herein stated.

Be it further remembered, That the above and foregoing exceptions and objections to the Court's main charge were made in open Court by the defendants within a reasonable time before the Court read his main charge to the jury and within a reasonable time after the preparation of the Court's main charge.

Be it further remembered, That all of said exceptions and objections were by the Court overruled, to which action of the Court in overruling said exceptions and objections and each of them, the defendants then and there, in open Court, excepted.

THOMPSON & BARWISE,
Attorneys for Defendants.

166 The above and foregoing Bill of Exception No. Six, having been presented to me, is approved by me as containing the exceptions and objections of defendant to the Court's main charge in the above case.

Witness my hand this 9th day of March, 1916.

CHARLES T. PREWETT, *Judge.*

Filed March 9th, 1916. W. H. Logan, County Clerk.

167 *Defendants' Bill of Exception No. 8.*

Dec. 22, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RAILWAY Co. et al.

Defendants' Bill of Exception No. 8 to the Action of the Court in Failing and in Refusing to Give Their Special Charges as Requested.

Be it remembered, That after the evidence in the case had been closed, the defendant, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, in open Court presented to the Court and to counsel for plaintiff, before the Court's main charge to the jury had been presented to the jury, and before argument in the case, their special charge No. 1, requesting a peremptory instruction for these defendants, for certain reasons therein shown and the Court, having refused to submit said charge to the jury as requested, these defendants did then and there duly except to the ruling of the Court, and then and there, in open Court, gave to the Court and to counsel for plaintiff, the following reasons as to why said charge should have been given, to-wit:

First. These defendants in their amended answer filed in this cause, pleaded that at the point of origin of said shipment of horses involved herein, to-wit: Watrous, New Mexico, the plaintiff
168 himself and the initial carrier, the Santa Fe Lines, entered

into a written contract covering the shipment and carriage of the plaintiff's said horses from Watrous, New Mexico to Waco, Texas, a point in one State of the United States to a point in another State in the United States, and that said shipment was therefore, governed and controlled by the laws of the United States regulating interstate commerce, and that one of the provisions in said contract of shipment so executed at Watrous, New Mexico was a provision which provided that any suit for the recovery of any damages arising out of said shipment should be instituted within six months after the damages accrued. This provision of the contract these defendants pleaded in bar of the plaintiff's right to recovery herein, and the evidence having shown the above facts, and having further shown that the plaintiff failed to bring his suit based upon damages accruing to said shipment of horses until March 2, 1915, more than six months after the happening of said damages as complained of, which damages, according to the allegations of the plaintiff's petition, occurred in October, 1913, and the said provision of said contract being reasonable, as a matter of law, and being legal and binding contract covering the shipment of plaintiff's horses from Watrous, New Mexico to Waco, Texas, notwithstanding the refusal of the subsequent carriers, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, to handle and transport said horses of the plaintiff under the
169 initial contract and requiring the execution of new contracts upon their respective lines of railroad, these defendants say that the plaintiff should be barred from a recovery in this suit for failing to comply with the provisions in said initial contract which have been properly pleaded and evidence adduced thereon, and for this reason the Court should grant the peremptory instruction in favor of these defendants.

Second. Plaintiff having filed suit on March 2, 1915, upon an express contract, as shown by the original petition filed on that date, and having amended his petition, filing his said first amended original petition on December 21, 1915, and setting up therein a cause of action based upon and arising from an implied contract, and these defendants having pleaded in their amended answer on file herein that the cause of action asserted in said amended petition of the plaintiff was and is barred by the Statute of limitation of two years in that said cause of action was pleaded more than two years after the occurring of the damages and injuries complained of, and evidence having been introduced in the case substantiating said plea, the Court should grant the peremptory instruction requested by these defendants.

Third. Plaintiff, in his amended petition filed December 21, 1915, having alleged certain acts of negligence against these defendants, can recover against these defendants only in the event that there
170 is some evidence introduced in the case tending to show that the defendants, or either of them, were guilty of the negligence in any of the respects mentioned in said petition, and further that some damage was caused and occasioned by reason of such negligence in the respects mentioned. The plaintiff having

pleaded that the defendant, Texas & Pacific Railway Company, was guilty of negligence in handling said stock from El Paso, Texas to Big Spring, Texas, and that five head of the horses were crippled between said places, and the evidence of the plaintiff's own witness, Fred Crowder, who accompanied the shipment between said points, showing that the said Texas & Pacific Railway Company between said points handled the shipment in the usual and customary way, and with no more than the usual and customary switching, jolting and jerking of the train, and the evidence of Kelley, whose deposition was taken in the case by the plaintiff, showing that while there were a few rough jerks and starts between Big Spring, Texas and El Paso, Texas, on the line of the Texas & Pacific Railway Company, yet the train between said points was handled reasonably well and that with the exception of one mare that got her foot caught in the car, the other animals were all right so far as he, Kelley, knew, when the shipment arrived at Abilene, Texas, a point on the line of the Texas & Pacific Railway Company considerably East of Big Spring, Texas, these defendants say that the plaintiff has failed to introduce any evidence in the case showing or tending to show that the Texas

171 & Pacific Railway Company was guilty of negligence in any of the respects complained of between El Paso and Big Spring, Texas, and the evidence in the case further showing that the Texas & Pacific Railway Company loaded said stock at El Paso in the same car in which the Santa Fe Railway Company has handled the stock from Watrous, New Mexico, to El Paso, to-wit: Santa Fe Car 57289; and the evidence in the case further showing that the plaintiff himself made an examination of said car at Watrous, New Mexico, and found it to be in good condition, and the evidence in the case failing to show that the said car was in an unsafe and unsuitable condition when the horses were loaded into it at El Paso, Texas; and the evidence in the case further showing that the plaintiff's said horses were watered and fed at El Paso, Texas, and at Big Spring, Texas, and that the Texas & Pacific Railway Company had facilities at Fort Worth, Texas, for watering and feeding said stock, and there being no evidence introduced to the contrary, and there being no evidence that the shipment was delayed between El Paso and Fort Worth, Texas, then these defendants say, by reason of all of these facts, plaintiff has failed to make out a case against the defendant, Texas & Pacific Railway Company, upon the grounds of negligence pleaded, and, therefore, the peremptory instruction requested by defendant should have been given.

Fourth. Plaintiff having further pleaded in said suit that his said horses were roughly handled and were deprived of feed and water from Big Spring, Texas to Waco, Texas, and the evidence 172 showing without dispute that when the horses arrived at Fort Worth, Texas, within eight hours after leaving Baird, Texas, that there were facilities at Fort Worth, Texas, provided by the said Texas & Pacific Railway Company for feeding and watering shipments of stock and horses; and the evidence of plaintiff's witnesses, as well as all of the witnesses, showing that there was no rough handling between Big Spring, Texas and Waco, Texas, and the evidence

of Fred Crowder, plaintiff's only witness, being to the effect that the only damage suffered by plaintiff's horses from Fort Worth to Waco, Texas, was by reason of their failure to have feed and water, then there was no proof as any other damages, and especially that of delay, hence, for all of these reasons these defendants say that the peremptory instruction should have been granted by the Court.

The Court and counsel for plaintiff having heard the foregoing reasons as to why said peremptory instruction should have been given, said reasons having been assigned by defendants in open Court, the Court thereupon overruled the request of the defendants to give said peremptory instruction to the jury, as well as the reasons assigned as to why said peremptory instruction should be given, and the defendants then and there, in open Court, excepted, and now makes and tenders this, its Bill of exception thereto, and ask that it be approved and ordered filed as a part of the record in said cause.

THOMPSON & BARWISE AND
GEORGE THOMPSON, Jr.,
Attorneys for Defendants.

Approved.

CHARLES T. PREWETT, *Judge.*

Filed December 22, 1915. W. H. Logan, County Clerk.

173 *Defendants' Bill of Exception No. 9.*

March 9, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RAILWAY CO. et al.

Defendants' Bill of Exception No. 9.

Be it remembered, That after the evidence had been concluded in the above entitled and numbered cause, and before the Court had submitted his main charge to the jury and before argument, and after the Court had presented to defendants' attorney and plaintiff's attorney his main charge, and after exceptions had been taken to said main charge by these defendants, the T. & P. Railway Company and the M., K. & T. Railway Company of Texas, within a reasonable time thereafter, the defendant, T. & P. Railway Company, presented to plaintiff's attorney and to the Court its special charge No. 2 asking for peremptory instruction in its favor at the hands of the jury, and the Court, after reading same, refused to give same to the jury, and the defendant, T. & P. Railway Company, at said time made the fol-

lowing objections to the refusal of the Court to give said peremptory instruction, said objections being stated to plaintiff's attorney and to the Court.

There has been introduced no evidence in the trial of this case showing or tending to show that the T. & P. Railway Company
174 was guilty of any of the grounds of negligence charged in plaintiff's petition, in that the only evidence introduced by plaintiff to prove these allegations was that of Fred Crowder, who stated that he could not remember exactly the manner in which the car was handled from El Paso to Fort Worth, but that it was his judgment that between said points the horses were handled with no more than the usual and customary switching, jerking and bumping than is given similar shipments for like distances by the railway companies in Texas, and for the further reason that the T. & P. Railway Company loaded plaintiff's horses at El Paso into the same car that they were originally loaded into from Watrous, New Mexico, and carried from that point to El Paso, Texas, by the Santa Fe Lines, and the evidence wholly fails to show that the T. & P. Railway Company failed to either provide a suitable car at El Paso, or failed to inspect the car at El Paso to see that it was suitable, and failed to further show that the car was either unsuitable or defective, and failed further to show that any damage was occasioned the shipment by reason of any defect in the car, there being no evidence showing or tending to show the proof of the allegations set out in plaintiff's petition against the T. & P. Railway Company, said peremptory instruction as contained in defendant's special charge No. 2 should be given.

The Court, after hearing said objections, and reasons of the
175 defendants, overruled same, and refused to give said special charge No. 2, and the defendant, T. & P. Railway Company then and there duly excepted to the action of the Court in so doing, and herein now tenders this, its Bill of Exception No. 9, and asks the Court to approve same, and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,

*Attorneys for Defendants M., K. & T. Ry.
Co. of Texas and T. & P. Ry. Company.*

Approved, 3/9/16.

CHARLES T. PREWETT, *Judge.*

Filed March 9th, 1916. W. H. Logan, County Clerk.

176

Defendants' Bill of Exception No. 10.

March 9th, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. CO. et al.

Defendants' Bill of Exception No. 10.

Be it remembered, that after the evidence had been concluded in above case, in the above entitled and numbered cause, and after the Court had prepared his main charge and given same to defendants' attorneys for their objections, and same had been given, and after defendants' special charges Nos. 1 and 2, requesting peremptory instruction had been refused by the Court, within a reasonable time thereafter, and within a reasonable time prior to the giving of the Court's main charge, the defendants, T. & P. Railway Company and the M., K. & T. Railway Company of Texas, presented to the Court and plaintiff's attorney, their special charge No. 3, which is as follows:

"GENTLEMEN OF THE JURY: If you find and believe from the evidence in this case that the defendant, Texas & Pacific Railway Company, furnished to the plaintiff, or to his agent, a safe and suitable car for the transportation of the plaintiff's horses from El Paso to Fort Worth, Texas, or if you find and believe from 177 the evidence in the case that none of the horses in the shipment were damaged as the proximate result of a hole or broken plank near the bottom of said car, and if you further find that the defendant Texas & Pacific Railway Company furnished to the plaintiff's agent facilities for feeding and watering the said horses from Big Spring, Texas to Fort Worth, Texas, and at Fort Worth, then you are instructed to return a verdict for the defendant, Texas & Pacific Company."

Said special charge was by the Court refused and the defendants then and there objected to the refusal of the Court to give said special charge for the following reasons:

That said special charge No. 3 instructed the jury with reference to the converse of the grounds of negligence relied upon by plaintiff, and pleaded by plaintiff in his first amended original petition, and further instructed the jury with reference to the duty of the T. & P. Railway Company to furnish plaintiff's agent, who accompanied the shipment of horses proper facilities for feeding and

watering the horses from Big Spring, Texas to Fort Worth, Texas, and at Fort Worth, Texas, such matters being covered in the pleadings of the defendants, and defendants are entitled to have said special charge No. 3 given for the reason that it is proper charge based upon the pleadings of the parties, and upon the evidence introduced and upon the law in the case, and these defendants will be prejudiced by the refusal of the Court to give said special charge.

The Court, after hearing said reasons and objections, overruled same and refused to give defendants' special charge No. 3, to which the defendants then and there duly excepted, for the reasons stated, and herein now tender this their Bill of Exception No. 10, and ask the Court to approve same and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,

*Attorneys for Defendants M., K. & T. Ry. Co.
of Texas and T. & P. Ry. Company.*

O. K.
TEMPLETON.

Approved, 3-9-16,

CHARLES T. PREWETT, *Judge.*

Filed March 9th, 1916. W. H. Logan, County Clerk.

179 *Defendants' Bill of Exception No. 11.*

March 9, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. Co. et al.

Defendants' Bill of Exception No. 11.

Be it remembered, that after the evidence had been concluded in the above case, in the above entitled and numbered cause, and after the Court had prepared his main charge and given same to defendants' attorney- for their objections and same had been given, and after defendants' special charges Nos. 1 and 2 had been refused by the Court within a reasonable time thereafter, and within a reasonable time prior to the giving of the Court's main charge, the defendants Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, presented to the Court and plaintiff's attorney their special charge No. 4, which is as follows:

"GENTLEMEN OF THE JURY: You are instructed that it was the duty of the plaintiff's agent who accompanied the shipment of horses from Fort Worth to Waco, Texas, to load, unload, reload, feed and water the said horses in the shipment between said points in the event facilities were afforded the plaintiff's said agent to do so by the defendant, Missouri, Kansas & Texas Railway Company of Texas; and you are further instructed that if you find and believe from the evidence that facilities were furnished at Fort Worth, or en route to plaintiff and his agent for feeding and watering said stock, then even though — find that the plaintiff's horses were damaged as the result of their failure to feed and water between said points, you are instructed to return a verdict for the defendant, M., K. & T. Railway Company of Texas."

Said special charge No. 4 was refused by the Court, and the defendant then and there gave to the Court and plaintiff's attorneys the following reasons and objections to the refusal of the Court to give said special charge. Said objections being as follows:

The M. K. & T. Railway Company of Texas pleaded a provision in the initial contract executed at Watrous, New Mexico, as well as a provision in a subsequent contract executed at Fort Worth, Texas, requiring the shipper's agent who accompanied plaintiff's horses to unload, load, feed, water and rest the said horses while being carried by the M. K. & T. Railway Company of Texas. The defendant, M. K. & T. Railway Company of Texas further pleaded that if plaintiff's horses were injured or damaged as a result of their failure to have feed, water and rest while in the custody of the M. K.

181 & T. Railway Company of Texas, that such damage was the result of contributory negligence of plaintiff's agent who accompanied the shipment in failing to do his duty as called for by the contract, and the defendant, M. K. & T. Railway Company of Texas stated to the Court that the provision in said contracts referred to, is a valid, legal and binding provision and is reasonable, and that special Charge No. 4 based upon same is proper and correct, and that the Court refusing to give said charge prejudiced the defendant M. K. & T. Railway Company of Texas for the reason that the Court's main charge does not include anything with reference to the duty of plaintiff, or plaintiff's agent in loading, unloading, feeding, watering and resting plaintiff's horses en route from El Paso, Texas to Fort Worth, Texas, or from El Paso, Texas to Waco, Texas, and an exception having been taken thereto, this defendant says to the Court that if this special charge is incorrect in stating that law with reference to the matters therein contained, then it is the duty of the Court to prepare a correct charge covering this matter, and for its failure so to do, this defendant excepts.

The Court, after hearing said objections, overruled same, to which action of the Court defendant M. K. & T. Ry. Co. of Texas then and there duly excepted for the reasons set out herein, and

herein now tender- its Bill of Exception No. 11 and asks the Court to approve same and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND

GEORGE THOMPSON, JR.,

Attorneys for Defendants M., K. & T. Ry. Co.

of Texas and T. & P. Ry. Co.

O. K.

TEMPLETON.

Approved, 3-9-16

CHAS. T. PREWETT, *Judge.*

Filed March 9, 1916. W. H. Logan, County Clerk.

182 *Defendants' Bill of Exception No. 12.*

March 9, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. Co. et al.

Defendants' Bill of Exception No. 12.

Be it remembered, that after the evidence had been conciuuded in above case, in the above entitled and numbered cause, and after the Court had prepared his main charge and given same to defendant's attorneys for their objections, and same had been given, and after defendants' special charges Numbers 1 and 2 had been refused by the Court within a reasonable time thereafter, and within a reasonable time prior to the giving of the Court's main charge, the defendants, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, presented to the Court and plaintiff's attorney their special charge No. 5 which is as follows:

"GENTLEMEN OF THE JURY: You are instructed that it was the duty of the plaintiff's agent who accompanied the shipment of horses from El Paso to unload reload and to feed and water the horses in the shipment while in the course of transportation and while — the cars and in the pens of the defendant between the points. in the event the Texas & Pacific Railway Company afforded
183 to the plaintiff and his agent facilities for so doing; and you are further instructed that if you find and believe from the evidence that facilities were furnished to the plaintiff or his agent for feeding and watering said horses en route from El Paso to Fort Worth, Texas, and at Fort Worth, then, even though you may find that the plaintiff's said horses were damaged by reason of their

failure to have feed and water between and at said places, you are instructed to return a verdict for the defendant, Texas & Pacific Railway Company, as to the damages, if any, caused by the failure of the said horses to have feed and water between said points."

Said special charge No. 5 was refused by the Court and the defendant T. & P. Railway Company then and there gave to the Court the following reasons and objections to the refusal of the Court to give same.

The defendant, Texas & Pacific Railway Company pleaded not only a provision in the initial contract executed at Watrous, New Mexico, but also a provision of the contract executed at El Paso, Texas between the agent of the T. & P. Railway Company and the plaintiff's agent who accompanied the shipment, with reference to the duty of plaintiff's agent who accompanied the shipment
 184 of horses from El Paso to Fort Worth to unload, reload, feed, water, and rest the horses while in the custody of the Texas & Pacific Railway Company, and the defendant Texas & Pacific Railway Company pleaded that if plaintiff's horses were damaged by reason of their failure to have feed, water and rest between Fort Worth and El Paso, then such damages was the result of plaintiff's agent's contributory negligence in failing to perform his duty according to the provisions of said contracts referred to, same being a valid, legal and binding one and reasonable, and same being incorporated in special charge No. 5 which correctly presented the law with reference to the same, said special charge No. 5 should be given by the Court, and defendant T. & P. Railway Company states to the Court that it will be prejudiced by the refusal of the Court to give said charge for the reason that the Court's main charge does not include anything with reference to the duty of plaintiff, or plaintiff's agent in loading, unloading feeding, watering and resting plaintiff's horses en route from El Paso, Texas to Fort Worth, Texas, or from El Paso Texas to Waco, Texas, and an exception having been taken thereto, this defendant says to the Court that if this special charge is incorrect in stating the law with reference to the matters therein contained, then it is the duty of the Court to prepare a correct
 185 charge covering this matter, and for its failure to so do this defendant excepts.

The Court after hearing said reasons and objections overruled same, and the defendant then and there duly excepted to the refusal of the Court to give said special charge No. 5, and herein now tenders this its Bill of Exception No. 12, and asks the Court to approve the same and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND
 GEORGE T. THOMPSON, JR.,

*Attorneys for Defendants M., K. & T. Ry. Co.
 of Texas and Texas & Pacific Ry. Co.*

O. K. TEMPLETON.

Approved, 3-9-16,

CHARLES T. PREWETT, *Judge.*

Filed March 9th, 1916. W. H. Logan, County Clerk.

186

Defendants' Bill of Exception No. 13.

March 9, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RAILWAY CO. et al.

Defendants' Bill of Exception No. 13.

Be it remembered, That after the evidence had been concluded in the above case in the above entitled and numbered cause, and after the Court had prepared his main charge and given same to defendants' attorneys for their objections, and same has been given, and after defendants' special charges Nos. 1 and 2 had been refused by the Court, within a reasonable time thereafter, and within a reasonable time prior to the giving of the Court's main charge, the defendants Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, presented to the Court and plaintiff's attorney, their special Charge No. 6, which is as follows:

"GENTLEMEN OF THE JURY: You are instructed that it was the duty of plaintiff or plaintiff's agent who accompanied the shipment of horses from El Paso, Texas to Fort Worth, Texas, to load, unload, feed, water, and rest said horses in the pens en route between said points, in the event that facilities were afforded to him for so doing by the Railway Company, and you are further instructed that if you find and believe from the evidence that facilities for loading, unloading, feeding, watering and resting plaintiff's horses were afforded to plaintiff's agent between El Paso, Texas and Fort Worth, Texas, and at Fort Worth, Texas by the Texas & Pacific Railway Company, then as to such damages, if any you find, as were suffered by plaintiff's horses by reason of their failure to be unloaded, reloaded, fed, watered and rested between Fort Worth, Texas and El Paso, Texas, you will not hold the Texas & Pacific Railway Company liable therefor."

Said special charge No. 6 was refused by the Court, and the defendant Texas & Pacific Railway Company then and there gave to the Court the following reasons and objections to the refusal of the Court to give same.

The defendant Texas & Pacific Railway Company pleaded not only provision of the initial contract executed at Watrous, New Mexico,

but also a provision of the contract executed at El Paso, Texas, between the agent of the T. & P. Railway Company and the plaintiff's agent who accompanied the shipment, with reference to the duty of plaintiff's agent who accompanied the shipment of horses from El

188 Paso to Fort Worth to unload, reload, feed, water and rest the horses while in the custody of the T. & P. Railway Company, and the defendant T. & P. Railway Company pleaded that if plaintiff's horses were damaged by reason of their failure to have feed, water and rest between Fort Worth and El Paso, then such damage was the result of plaintiff's agent's contributory negligence in failing to perform his duty according to the provisions of said contracts referred to, being valid, legal and binding one and reasonable, and same being incorporated in special charge No. 6, which correctly presented the law with reference to the same, and special charge No. 6 should be given by the Court. And defendant T. & P. Railway Company states to the Court that it will be prejudiced by the refusal of the Court to give said charge, for the reason that the Court's main charge does not include anything with reference to the duty of plaintiff, or plaintiff's agent in loading, unloading, feeding, watering and resting plaintiff's horses en route from El Paso, Texas to Fort Worth, Texas, or from El Paso, Texas to Waco, Texas and an exception having been taken thereto, this defendant states to the Court that if this special charge is incorrect in stating the law with reference to the matters therein contained, then it is the duty of the Court to prepare a correct charge covering this matter, and for its failure so to do, this defendant excepts.

189 The Court, after hearing said reasons and objections overruled same, and the defendant then and there duly excepted to the refusal of the Court to give said special charge No. 6, and herein now tenders this, its Bill of Exception No. 13, and asks the Court to approve same and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND
GEORGE THOMPSON JR.,
Attorneys for Defendants M., K. & T.
Ry. Co. of Texas and T. & P. Ry. Co.

O. K.

TEMPLETON.

Approved, 3-9-16.

CHARLES T. PREWETT, *Judge.*

Filed March 9th, 1916. W. H. Logan, County Clerk.

190

Defendants' Bill of Exception No. 14.

March 9, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Bill of Exception No. 14.

Bt it remembered, That after the evidence had been concluded in above case, in the above entitled and numbered cause, and after the Court had prepared his main charge and given same to the defendants' attorneys for their objections, and same had been given, and after defendants' special charges Nos. 1 and 2 had been refused by the Court, within a reasonable time thereafter, and within a reasonable time prior to the giving of the Court's main charge, the defendants Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, presented to the Court and plaintiff's attorney their special charge No. 7, which is as follows:

"GENTLEMEN OF THE JURY: You are instructed that it was plaintiff- or his agent's duty to load, unload, feed, water and rest his horses from El Paso, Texas to Waco, Texas, in the event facilities were afforded him for so doing by the defendant upon their
191 respective lines of railway; and if you find and believe from the evidence that facilities for so doing were furnished plaintiff, or his agent, you are instructed not to hold these defendants liable for such damages, if any, that plaintiff's horses suffered by reason of their failure to unload, water and feed en route, between said points, if you find such was the case, even though you may find and believe from the evidence that said horses were confined in the cars for a longer period of time than 28 hours in violation of the law, which has heretofore been presented to you."

Said special charge No. 7 was refused by the Court, and the defendant Texas & Pacific Railway Company then and there gave to the Court the following reasons and objections to the refusal of the Court to give same.

The defendant, T. & P. Railway Company, pleaded not only a provision in the initial contract executed at Watrous, New Mexico, but also a provision of the contract executed at El Paso, Texas, between the agent of the T. & P. Railway Company and the plaintiff's agent, who accompanied the shipment, with reference to the duty of plaintiff's agent who accompanied the shipment of horses from

El Paso to Fort Worth to unload, reload, feed, water and rest the horses while in the custody of the T. & P. Railway Company, and the defendant T. & P. Railway Company pleaded that if plaintiff's horses were damaged by reason of their failure to have feed, 192 water and rest between Fort Worth and El Paso then such damages was the result of plaintiff's agent's contributory negligence in failing to perform his duty according to the provisions of said contracts referred to being valid, legal and binding one and reasonable, and same being incorporated in special charge No. 7 which correctly presented the law with reference to the same, and special charge No. 7 should be given by the Court. And defendant T. & P. Railway Company states to the Court that it will be prejudiced by the refusal of the Court to give said charge for the reason that the Court's main charge does not include anything with reference to the duty of plaintiff, or plaintiff's agent, in loading, unloading, feeding, watering and resting plaintiff's horses en route from El Paso, Texas to Fort Worth, Texas, or from El Paso, Texas to Waco, Texas, and an exception having been taken thereto this defendant states to the Court that if this special charge is incorrect in stating the law with reference to the matters therein contained, then, it is the duty of the Court to prepare a correct charge covering this matter, and for its failure to do so, this defendant excepts.

The Court, after hearing the said reasons and objections overruled same, and the defendant then and there duly excepted to the ruling of the Court to give said special charge No. 7, and herein 193 now tenders this, its Bill of Exception No. 14, and asks the Court to approve same, and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,

*Attorneys for Defendants K., K. & T. Ry.
Co. of Texas and T. & P. Ry. Company.*

O. K.,

TEMPLETON.

Approved, 3-9-16.

CHARLES T. PREWETT, *Judge.*

Filed March 9th, 1916. W. H. Logan, County Clerk.

194

Defendants' Bill of Exception No. 15.

March 9, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Bill of Exception No. 15.

Be it remembered, That after the evidence had been concluded in above case, in the above entitled and numbered cause, and after the Court had prepared his main charge and given same to defendants' attorneys for their objections, and same had been given, and after defendants' special charges Nos. 1 and 2 requesting the peremptory instruction had been refused by the Court, within a reasonable time thereafter and within a reasonable time prior to the giving of the Court's main charge, the defendants, T. & P. Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, presented to the Court and plaintiff's attorney their special charge No. 8, which is as follows:

"GENTLEMEN OF THE JURY: You are instructed that if you find and believe from the evidence in this case that the defendant, Texas & Pacific Railway Company, after receiving the plaintiff's said horses at El Paso, Texas, for shipment, used ordinary care to handle and transport the said horses from El Paso, Texas to Big Spring, Texas; and if you further find and believe from the evidence that the defendant, Texas & Pacific Railway Company furnished a safe and suitable car at El Paso, Texas, for the transportation of the plaintiff's said horses; and if you further find and believe from the evidence in this case that the plaintiff's agent who accompanied the shipment of horses was afforded facilities for feeding and watering said horses, or if in this connection you find and believe from the evidence in the case that the plaintiff's horses were not damaged from a failure to receive feed and water while en route from El Paso to Fort Worth, Texas, then you are instructed to return a verdict for the defendant, Texas & Pacific Railway Company."

Said special charge was by the Court refused, and the defendants then and there objected to the refusal of the Court to give said special charge for the following reasons:

That said special charge No. 8 instructed the converse of the grounds of negligence relied upon by plaintiff and pleaded by plaintiff in his first amended original petition, and further instructed the

jury with reference to the duty of the T. & P. Railway Company to furnish plaintiff's agent who accompanied the shipment of horses proper facilities for feeding and watering the horses from Big Spring,

196 Texas to Fort Worth, and at Fort Worth, Texas, such matters being covered in the pleadings of the defendants, and the defendants are entitled to have said special charge No. 3 given for the reason that it is a proper charge based upon the pleading of the parties, and upon the evidence introduced, and upon the law in the case, and these defendants will be prejudiced by the refusal of the Court to give said special charge.

The Court, after hearing said reasons and objections, overruled same, and refused to give its special charge No. 8, to which the defendants then and there duly excepted, for the reasons stated, and herein now tender this their Bill of Exception No. 15, and ask the Court to approve same, and order it filed as a part of the record hereof.

THOMPSON & BARWISE AND

GEORGE THOMPSON, JR.,

Attorneys for Defendants M., K. & T. Ry. Co.

of Texas and T. & P. Railway Company.

O. K.,

TEMPLETON.

Approved, 3-9-16.

CHARLES T. PREWETT, *Judge.*

Filed March 9, 1916. W. H. Logan, County Clerk.

197

Defendants' Bill of Exception No. 16.

March 9, 1916.

In the County Court of Tarrant County for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RAILWAY COMPANY et al.

Defendants' Bill of Exception No. 16.

Be it remembered, That upon a trial of the above entitled and numbered cause after the evidence had been introduced and was before the jury, and after the Court's charge had been read to the jury, J. A. Templeton, counsel for plaintiff, in his opening argument of the case to the jury, made the following statement:

"The testimony of the Texas & Pacific Railway Company's witness, as shown by his deposition, discloses that in the opinion of said wit-

ness, the usual and customary time to handle stock from El Paso, Texas, to Fort Worth, Texas, was from thirty-six to forty hours, this time including stops for feed, water and rest."

Counsel for the defendants duly objected to that part of said argument quoted, in which counsel for the plaintiff stated that the witness had testified that the time of thirty-six to forty hours included stops

for feed, water and rest, because same was outside of the record, 198 in that the witness stated no such thing, and the argument was, therefore, improper and prejudicial. The objection so made was by the Court overruled, to which action these defendants excepted in open Court, and these defendants say that said action and argument of counsel for plaintiff as complained of was improper and prejudicial to the rights of the defendants, and they herein now make and tender this, their Bill of Exception No. 16, which they ask the Court to approve and order filed as a part of the record in this cause.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,

Attorneys for Defendants.

Approved, the the following explanation:

CHARLES T. PREWETT, *Judge.*

This bill should be approved with the following explanation, to-wit: When defendants' counsel made his objection to the argument in question, plaintiff's counsel stated that he interpreted and construed the testimony of the witness as given in his deposition to the effect that "the usual and customary time to handle stock from El Paso to Fort Worth was from 36 to 40 hours" (which evidence he then read to the jury,) to mean that the time so given included the time necessary for stops for feed water and rest, and that this 199 was simply his deduction from the evidence of the witness as given in his deposition; thereupon the Court overruled the objections to the argument, and left it to the jury to say whether or not this construction of the witness' testimony was justified by the language in his deposition.

O. K.

TEMPLETON.

Filed March 9, 1916. W. H. Logan, County Clerk.

Defendants' Bill of Exception No. 17.

Dec. 31, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Bill of Exception No. 17.

Be it remembered, That upon the trial of the above entitled and numbered cause, after the evidence had been introduced and was before the jury, and after the Court's charge had been read to the jury, J. A. Templeton, counsel for the plaintiff in his opening argument of the case to the jury, made the following statements, to-wit:

"One of the Railway Company's witnesses in his deposition testified that the usual and customary time that it required the Texas & Pacific Railway Company to haul stock from El Paso to Fort Worth was from thirty-six to forty hours, including stop for feed, water and rest, and this is about correct, for it requires a passenger train twenty-four hours to go this distance, and twelve to sixteen hours' additional time allowed for freight train to go this distance would make the answer of the witness, thirty-six to forty hours, about correct.

201 Counsel for the defendants duly objected to that part of the argument so made by counsel for the plaintiff in which it was stated that it required twenty-four hours for a passenger train to go between El Paso and Fort Worth, for the reason that said argument of counsel on said point was outside of the record, in that there was no evidence introduced at the trial of this case showing what was the usual and customary time for a passenger train to run between El Paso and Fort Worth, and for this reason the argument of counsel complained of was wholly improper and unfair and prejudicial.

Upon defendants taking their exception and objection to the argument of counsel complained of, plaintiff's counsel, in the presence of the jury, made the following additional statement to the Court and to the jury:

"I have got a right to assume, approximately the time that a passenger train required to run between El Paso and Fort Worth, and I have got a right to argue to the jury what that time is."

Counsel for the defendants again objected to the remarks of the counsel for plaintiff for the same reasons previously stated herein, and, at said time, requested the Court to instruct the jury not to consider any of the remarks made by counsel with reference to the

202 time it required a passenger train to run between El Paso and Fort Worth, which the Court refused to do, and the defendants then and there excepted to said refusal of the Court to grant said request, and further excepted to the action of the Court in overruling its objections to the remarks of counsel complained of herein, and defendants say that said action and argument of counsel for plaintiff was improper and prejudicial to the rights of the defendants, and they herein now make and tender this, their Bill of Exception No. 17, and request the Court to approve the same, and order it filed as a part of the record herein.

THOMPSON & BARWISE AND

GEORGE THOMPSON, JR.,

Attorneys for Defendants M., K. & T. Ry. Co.

O. K. *of Texas and T. & P. Ry. Company.*

TEMPLETON.

Approved,

CHARLES T. PREWETT, *Judge.*

Filed December 31st, 1915. W. H. Logan, County Clerk.

203 *Defendants' Bill of Exception No. 18.*

Dec. 31, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RAILWAY Co. et al.

Defendants' Bill of Exception No. 18.

Be it remembered, That upon the trial of the above entitled and numbered cause after the evidence had been introduced and was before the jury, and after the Court's charge had been read to the jury, J. A. Templeton, counsel for the plaintiff, in his closing argument of the case to the jury, made the following statement, to-wit:

"The testimony of the Railway Company's witnesses shows without dispute that plaintiff's horses were held at Big Spring, Texas, for feed, water and rest, approximately twenty-four hours. Whereas, as a matter of fact they only should be held about five or six hours, which time would have been sufficient for them to have received feed, water and rest, but instead of reloading the horses and shipping them out of Big Spring at the end of five or six hours after they had been unloaded there, the Railway Company did not do so, but held them at Big Spring, for about Nineteen hours longer, during which

time there were probably several trains, probably seven or eight, freight trains, that passed Big Spring coming to Fort Worth, that could have carried these horses on to Fort Worth, and thus saved them from being damaged as they were."

Counsel for the defendants duly objected to that part of the argument so made by counsel for plaintiff, to the effect that there were seven or eight freight trains that passed Big Springs coming to Fort Worth, that could have carried plaintiff's horses on to Fort Worth, for the reason that there was no evidence to this effect introduced at the trial of the case, and the argument of counsel was wholly improper in that he was arguing outside of the record, and assumed facts which were not in evidence, and thereupon plaintiff's counsel, in the presence of the jury, made the following additional statement to the Court and to the jury:

"I have got a right to assume these facts, that there were probably several trains probably seven or eight freight trains that passed Big Springs during the time I have mentioned, that could have carried these horses on to Fort Worth, and have saved them the damage that they suffered; I have got a right to draw my inference along this line. The Railway Company has not produced any witnesses to prove that no trains passed Big Springs during the time the horses were there, and I have got a right to assume and argue to the jury that there were probably at least seven or eight freight trains that passed Big Springs coming to Fort Worth that could have carried these horses to Fort Worth, and thus obviated the long delay at Big Springs, and have saved these horses from damage that they did suffer."

Counsel for the defendants duly objected to said statement and argument so made by counsel for the plaintiff, that he had a right to assume the fact that seven or eight freight trains passed Big Springs coming to Fort Worth that could have carried plaintiff's horses to Fort Worth, and thus have obviated the long delay at Big Springs for the reasons previously stated, and thereupon, at said time, these defendants made a request of the Court to have the jury not consider same, which request the Court overruled, to which action of the Court the defendants then and there excepted in open Court, and further excepted to the action of the Court in overruling its objections to the remarks of counsel complained of herein, and defendants now say that said action and argument of counsel for plaintiff was improper and prejudicial to the rights of the defendants, and they herein now make and tender this, their Bill of Exception No. 18, requesting the Court to approve same and order it filed as a part of the record herein.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,

O. K.
TEMPLETON.

Attorneys for Defendants.

Approved, 3-9-16.

CHARLES T. PREWETT, *Judge.*

Filed March 9th, 1916. W. H. Logan, County Clerk.

207

Defendants' Bill of Exception No. 19.

Dec. 31, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Bill of Exception No. 19.

Be it remembered, That after the Court had given the jury his main charge in the above entitled and numbered cause, and after the jury had retired to the jury room to consider their verdict, said jury returned into Court the following verdict, to-wit:

December 21st, 1915.

"Honorable Judge Pruitt:

"We, the jury, find for the plaintiff—in the sum of Three Hundred Dollars, bearing six per cent interest from the time of the sale of the horses until the suit is settled.

(Signed)

D. BRUMMITT, *Foreman.*"

The Court, after receiving said verdict, instructed the jury as follows:

"GENTLEMEN OF THE JURY: In your verdict just returned, you did not state as to which of the defendants the amount of
208 damage was assessed, and you are instructed to retire to the jury room taking with you the Court's charge, and be governed in accordance thereby."

Thereupon the jury retired to the jury room, and, after a time, returned to the Court the following verdict:

"December 21st, 1915.

"Honorable Judge Pruitt:

We, the jury, find for the plaintiff in the sum of Three Hundred Dollars against the T. & P. and the M. K. & T. Ry. Company; said Three Hundred Dollars bearing six per cent from the 16th day of October, 1913, to the present time.

(Signed)

D. W. BRUMMITT, *Foreman.*"

And, after the jury had returned the second verdict, above set out, into the Court, the defendants, Texas & Pacific Railway Company

and the M. K. & T. Railway Company of Texas, requested and filed with the Court its motion asking the Court to discharge the jury and order a mistrial in this case for the following reasons:

The jury has evidently been misled and confused by the Court's charge, and is being misled and is being confused, and does not know how to return a verdict in this case, and said jury is not being governed by the Court's charge and is not following the same, for the charge is clear and plain, but said jury is simply casting around in their own way without guidance from the Court's charge in attempting to return a verdict, and these defendants say that such a method of returning a verdict by the jury is illegal, improper and very prejudicial to both of these defendants, and for these reasons, without further questioning by the Court, there being an irreconcilable conflict and confusion in the minds of the jury as to the damages and verdict, and by reason of all of the above facts, these defendants present this their motion, and request the Court to grant the relief prayed for herein—

Whereupon the Court, after hearing said reasons and the motion of the defendants as aforesaid, refused to grant said motion, and the defendants named thereupon duly excepted to the ruling of the Court, and herein now tender this, their Bill of Exception No. 19, and request the Court to approve same and order it filed as a part of the record in this case.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,

Attorneys for Defendants.

O. K.

TEMPLETON.

I hereby approve the above Bill of Exception.

CHARLES T. PREWETT, *Judge.*

Filed December 31st, 1915. W. H. Logan, County Clerk.

210 *Defendants' Bill of Exception No. 20.*

Dec. 31, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Bill of Exception No. 20.

Be it remembered, That in the trial of the above cause, after the jury had received the Court's charge, and had retired to the jury

room for consideration, the jury thereupon returned the following verdict:

"December 21st, 1915.

"Honorable Judge Pruitt:

We, the jury, find for the plaintiff in the sum of Three Hundred Dollars, bearing six per cent interest from the time of the sale of the horses until the suit is settled.

(Signed)

D. BRUMMITT, *Foreman.*"

The Court, after receiving said verdict, instructed the jury as follows:

"GENTLEMEN OF THE JURY: In your verdict just received, you did not state as to which of the defendants the amount of damage
211 was assessed, and you are instructed to retire to the jury room, taking with you the Court's charge, and be governed thereby."

Thereupon the jury retired to the jury room and, after a time returned to the Court the following verdict:

"December 21st, 1915.

"Honorable Judge Pruitt:

We, the jury, find for the plaintiff in the sum of Three Hundred Dollars against the T. & P. and the M. K. & T. Ry. Company said Three Hundred Dollars bearing six per cent from the 16th day of October, 1913 to the present time.

(Signed)

D. W. BRUMMITT, *Foreman.*"

After the second verdict above set out had been returned into Court, the Court thereupon, over the objection these defendants; questioned the jury as follows:

Question by the Court: "In this case you are attempting to render a verdict against defendants for Six Hundred Dollars?"

Foreman of the Jury Answers: "Shall I answer for all?"

Question by Court: "Yes."

212 Answer by Foreman: "No, we did not intend to render a verdict for Six Hundred Dollars, and if we have done so, it was error."

Question by Court: "What part of the damage did you intend to find against the T. & P. Ry. Company?"

Answer by Foreman: "We did not attempt to set out the damages against any one of the defendants, but simply stated the amount against both of them."

The Court: "You are asked to go back and to take the charge of the Court and read over the charge, and I think you will be able to find a verdict."

Up to this state of the proceedings, the parties present had been R. F. Milam, attorney for plaintiff, C. T. Prewett, Judge of said Court, George Thompson, Jr., Attorney for the defendants, and the jury.

At this state in the proceedings Mr. J. A. Templeton Associate Counsel with Mr. Milam for the plaintiff, appeared, and, the matter having been explained to him by the Court, the following charge was given to the jury by the Court at the suggestion of Mr. Templeton:

"GENTLEMEN OF THE JURY: In this case you are instructed to apportion the damage, if any, between the railroads. If you find against the above roads, saying what part thereof you assess against each."

CHARLES T. PREWETT, *Judge*.

213 The defendants, Texas & Pacific Railway Company and the M. K. & T. Railway Company of Texas, objected to the above questions of the Court addressed to the jury, and all of the answers of the jury addressed to the Court, because the same were wholly improper, prejudicial and illegal in that the Court had given to the jury his general charge prepared by plaintiff's counsel, Mr. Templeton. Said charge containing in it a clear and concise statement of all of the matters necessary to enable the jury to return a proper verdict and the said proceedings so had were unnecessary, and besides being improper and illegal, acted as a force to influence the jury in determining a verdict and in hastening their verdict, and further acted as a force to cause the jury to return a verdict without such deliberation and consideration as the law allows parties interested in the case, and for all of these reasons and for the further reason that the remarks of the Court to the jury were in conflict with the Court's main charge, these defendants excepted, which exceptions the Court overruled, and, at the time the Court gave to the jury the charge last named, requesting them to apportion the damages, if any, between the roads, if they found against both the roads, the defendants, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, objected to the giving of said charge to the jury, for the reason that it was wholly improper and prejudicial to the defendants, in that it was in conflict with the Court's main charge, and it did not re-

214 quire the jury to be governed by the Court's main charge, and as a matter of truth and fact the jury could not assess the damage against each of the roads unless it followed the instructions laid down in the Court's main charge, and for the further reason that the Court's main charge was clear and concise upon the point instructed, and the necessity of giving same showed that the jury was in a state of confusion, and were unnerved and were in no condition to render a fair and impartial verdict, but that said jury were up in the air, and did not know exactly what to do, but were attempting to follow what the Court wanted it to do without regard to the Court's main charge, and without regard to the law given to it in this case, and for all of these reasons, these defendants excepted to the giving of said charge, which the Court overruled at said time, and the jury thereupon at this state of the proceedings, after the last charge named had been given to them, re-

tired to further consider their verdict, and after a few minutes' consideration, brought into Court the following verdict, which was the third that they had brought in to-wit:

"December 21st, 1915.

"We, the jury, apportion the damage against the Missouri, Kansas & Texas Ry. Company of Texas One Hundred Dollars (and the charge shows that this One Hundred Dollars was scratched out these remarks being the defendants'). Fifty Dollars, and
215 against the Texas & Pacific Railway Company, \$250. Two Hundred and Fifty Dollars, bearing six per cent interest from the 16th day of October, 1913.

(Signed)

D. W. BRUMMITT, *Foreman.*"

After the receipt of this verdict, the Court, after examining the same over the objections of the defendants, asked the jury the following question:

"Did you mean to find for the plaintiff and assess his damages against the M. K. & T. Ry. Company of Texas for \$50, and against the T. & P. for \$250, with six per cent interest from the 16th day of October, 1913?"

Answer of Foreman: "Yes."

Thereupon, the Court inserted the words after "we, the jury," "find for plaintiff," making the verdict read: "We, the jury, find for plaintiff and apportion the damage, etc."

This ended the proceedings, and the jury was discharged, the Court accepting this last verdict as amended by the Court.

Whereupon at said time the defendants, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas, excepted to all of said proceedings herein contained in its bill of exception,
216 for the reason that they were wholly irregular and improper, that they were confusing and misleading to the jury, that they were prejudicial to the interests of the defendants in that defendants were entitled to have the jury return a verdict against them in accordance with the law as given to the jury in the Court's charge, which was clear and concisely stated, and to have the said jury consider the damages, if any, to be assessed against the defendants with *clanness* and deliberation, and all of the above proceedings had tended to throw the jury into a state of confusion, and force them to a quick verdict, not knowing whether they were following the charge of the Court or not, but simply in their wild way, after the Court had questioned them, and after the proceedings the jury had attempted to follow the directions as given them in the Court's conversation and by his charge, and for all of these reasons, and for the further reason as above stated, that at the time the jury returned their last and final verdict in pursuance of the last charge given to the jury, the defendants Texas & Pacific and Missouri, Kansas & Texas Railway Company of Texas, called to the attention of the Court, that the jury, at the time they were considering the final verdict, did not take into the jury room either the Court's main charge, or the defendants' special charges, and

that, therefore, the final verdict of the jury was not governed by either the general charge or the special charge, because the
217 jury did not have same with them in the jury room, and defendants excepted to the verdict on this ground, the said charges being on the Court's desk during the times mentioned, which exception the Court overruled, and the defendants herein excepted for all of the reasons stated herein, and defendants herein except further to the receipt of the final verdict, for the reason that the conduct of the jury and the Judge was conducive to an improper verdict, and was prejudicial to the defendants, and the verdict of the jury and the proceedings had as stated in this bill of exception showed the jury were misled and confused, and were biased and prejudiced against the defendants herein.

Wherefore, the defendants pray that the Court allow this as defendants' Bill of Exception No. 20, and order it filed as a part of the record of this cause.

THOMPSON & BARWISE AND
GEORGE THOMPSON, JR.,
Attorneys for Defendants.

O. K.
TEMPLETON.

Approved,

CHARLES T. PREWETT, *Judge.*

Filed December 31st, 1915. W. H. Logan, County Clerk.

218 *Defendants' Bill of Exception No. 21.*

Dec. 31st, 1915.

In the County Court of Tarrant County, Texas, for Civil Cases.

No. 14456.

B. LEATHERWOOD

vs.

TEXAS & PACIFIC RY. COMPANY et al.

Defendants' Bill of Exception No. 21.

Be it remembered, that at the time the Court approved the judgment prepared by plaintiff's attorneys upon the verdict and verdicts of the jury in the above case, the defendants herein, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, duly objected to said part of said judgment and taxed the costs of the depositions taken by the Santa Fe Lines against these defendants for the reasons that in plaintiff's original petition, and in his amended petition, the Santa Fe Lines, were

made parties defendant, and judgment was asked against them by the plaintiff, and by reason of same, the Santa Fe Lines took certain depositions to prove their record of handling from Watrous, New Mexico to El Paso, Texas, and it was not until after all parties had announced ready for trial, and the defendants and plaintiff had retired from the Court room to strike the jury that plaintiff returned into the Court room and announced that he would dismiss as to the Santa Fe Lines, it being understood between the
 219 counsel for plaintiff and counsel for the Santa Fe Lines that the costs incurred by the Santa Fe Lines should be taxed against the plaintiff.

And it is a further fact that at the time plaintiff dismissed as to the Santa Fe Lines, there was on file a deposition of the Texas & Pacific Railway Company's agent at El Paso taken by the Santa Fe Companies to the effect that plaintiff's horses were in good condition at the time the Texas & Pacific accepted same from the Santa Fe Lines at El Paso, and at the time said horses left El Paso, and it was unnecessary for plaintiff to go beyond this admission to prove that the horses were in good condition when delivered to the Texas & Pacific Railway Company, and these defendants state that the costs incurred by the Santa Fe Lines, by reason of all of the facts heretofore mentioned, should not be taxed against these defendants, and, in any event only the deposition of the T. & P. agent at El Paso, referred to above.

The Court, after hearing said objections to said part of said judgment, overruled same, to which action of the Court, defendants then and there excepted, and herein now tender this their Bill of Exception No. 21, and ask the Court to approve same and order it filed as a part of the record herein.

THOMPSON & BARWISE AND
 GEORGE THOMPSON, JR.,

Attorneys for Defendants.

Approved, 3-9-16,

CHARLES T. PREWETT, *Judge.*

Filed March 9, 1916. W. H. Logan, County Clerk.

220 *Defendant's M., K. & T. Ry. Co. of Texas Supersedeas Bond.*

Jan'y 14, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases,
 December Term, A. D. 1915.

No. 14456.

B. LEATHERWOOD

VS.

M., K. & T. OF TEXAS RY. Co. and T. & P. RY. Co.

Whereas, in the above entitled and numbered cause, pending in the County Court of Tarrant County, Texas for Civil Cases, at

a regular term of said Court, to-wit: on the 22nd day of December, A. D. 1915, the said B. Leatherwood recovered judgment against the said Missouri, Kansas & Texas Railway Company, and the Texas & Pacific Ry. Co., corporations, for the sums of Fifty Dollars and Two Hundred and Fifty Dollars, respectively, with interest thereon from the 16th day of October, A. D. 1913 at the rate of six per cent per annum, besides costs of suit, from which judgment the said Missouri, Kansas & Texas Ry. Company of Texas, a corporation, against whom the judgment for Fifty Dollars was rendered, has taken an appeal to our Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

Now, therefore, we, the said Missouri, Kansas & Texas Ry. Company of Texas, as Principal, and the undersigned, as Sureties, acknowledge ourselves bound to pay to the said B. Leatherwood and the Texas & Pacific Railway Company, a corporation, the
221 sum of One Hundred Fifty Dollars.

Conditioned that the said Missouri, Kansas & Texas Ry. Company of Texas, a corporation, Appellant, shall prosecute its said appeal with effect, and in case the judgment of the Supreme Court, or the Court of Civil Appeals, shall be against it that it shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against it.

Witness our hands, this 10 day of January, A. D. 1916.

MISSOURI, KANSAS & TEXAS RY. CO.
OF TEXAS,
By THOMPSON & BARWISE, *Its Attys.*
C. C. HUFF.
JOHN N. SIMPSON.

Approved the 14 day of Jan'y A. D. 1916,

W. H. LOGAN,
Clerk Co. Court, Tarrant County,
By GEO. HARRIS, *Deputy.*

Filed January 14, 1916. W. H. Logan, County Clerk.

222 *Defendant's T. & P. Supersedes Bond.*

January 14, 1916.

In the County Court of Tarrant County, Texas, for Civil Cases, December Term, A. D. 1915.

No. 14456.

B. LEATHERWOOD

VS.

T. & P. Ry. Co. and M., K. & T. Ry. Co.

Whereas, in the above entitled and numbered cause, pending in the County Court of Tarrant County, Texas, for Civil Cases, at a

BILL OF COSTS

BILL OF COSTS

B. Leatherwood

Plaintiff

No. 14456

vs.

T & P Ry Company et al.

Defendant.

M

as Principal

and

as Sureties.

To OFFICERS OF COURT, Dr.

To Costs accrued in above entitled case to adjournment of Term, 1911.

Revised Civil Statutes, Article 1401, amended so that oath in forma pauperis may be contested by officers of the Court and the issue tried as to ability of party to give bond for costs.

Article 1400 (A) reads: It shall be lawful for Clerks of the District and County Courts and Justices of the Peace to demand payment of all costs due and owing by any party to their respective Courts up to the adjournment of each term of said Courts.

Article 1400 (B) provides ten days after such demand, the Clerk or Justice may place certified copies of bill of costs then due in the hands of the Sheriff or Constable for collection, which shall have force and effect of an execution. Taking an appeal does not interfere or suspend the right.

Article 1400 (C) authorizes levy and sale, but no costs or charges allowed for making out certified bill of costs, or for collection, unless levy is made.

| CLERK'S FEES | | SHERIFF'S FEES | | Plaintiff | Defendant |
|-------------------------------|------------|----------------------------|--|---------------|-----------|
| Filing and Docketing | | Executing Citations | | 1 75 | |
| Issuing Citations or Writs 4 | 2 00 | Executing Precepts | | | |
| Copy Petition 2 | 2 40 | Executing Subpoenas | | | |
| Recording Returns | 50 | Executing Notices | | | |
| Filing Papers | 10 | Sheriff Jury Fee | | | |
| Entering Appearance | 05 | Total | | 1 75 | |
| Copy Interrog. for Precepts | | Jury Fee | | 3 00 | |
| Issuing Precepts | | Witness Fees | | | |
| Copy Interrog. for Com. | | Notary Fee (14) | | 45 25 | |
| Issuing Commission 2 | 1 00 | Steno fee | | 10 00 | Pl by |
| Filing Deposition and Certs. | 20 | Statement of facts | | 40 00 | defen- |
| Issuing Subpoenas | | | | | dents |
| Affidavits | | | | | |
| Motions (14) | | | | | |
| Entering Continuances | | | | | |
| Entering Orders | 50 | | | | |
| Swearing Jury | 50 | | | | |
| Swearing Witnesses | | Judge's Fee | | 3 00 | |
| Final Judgment | 50 | J. P. Costs | | | |
| Taking Costs | 25 | Clerk's Costs Brought Over | | 86 85 | |
| Issuing Return | | | | <u>192 85</u> | |
| Filing and Approving Bond (2) | | | | | |
| Transcript | | | | | |
| Filing Brief | 75 00 | | | | |
| Issuing Notices | | | | | |
| Total Clerk's Fees | 8 15 80 70 | | | | |

THE STATE OF TEXAS }
Tarrant County.

IN THE COUNTY COURT OF TARRANT COUNTY
FOR CIVIL CASES

I, M. H. Logan

Clerk of the County Court of Tarrant County for Civil
Cases, in and for said County and State, hereby certify the above to be a correct account of the costs in the above entitled
and numbered suit up to this date.

Witness my hand and the seal of said Court affixed at office in the City of Fort Worth, this the

31th day of March 1916.

M. H. Logan

Clerk County Court of Tarrant County for Civil Cases,
Tarrant County, Texas

By Mrs. C. E. Bard Deputy.

THIS PAGE BOUND
VERTICAL IN BOOK

BILL OF COSTS

No. 14456

In County Court of Tarrant County
for Civil Cases.

B. Leatherwood,

vs.

T & P Ry Company et al.

Received of

the within Cost Bill the sum of \$

in

This

A. D. 191

We hereby certify that we have examined the
within Cost Bill and approved the same.

Attorneys for

124651--Texas Printing Company.

regular term of said Court, to-wit: on the 22nd day of December, A. D. 1915, the said B. Leatherwood recovered judgment against the said Texas & Pacific Railway Company and the Missouri, Kansas & Texas Ry. Company of Texas, corporations, for the sum of Two Hundred and Fifty Dollars and Fifty Dollars, respectively, with interest thereon from the 15th day of October, A. D. 1913, at the rate of six per cent per annum, besides costs of suit, from which judgment the said Texas & Pacific Ry. Company, a corporation, against whom the judgment for Two Hundred and Fifty Dollars was rendered, has taken an appeal to our Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas.

Now therefore, We, the said Texas & Pacific Ry. Company, as principal and the undersigned as Sureties, acknowledge ourselves bound to pay to the said B. Leatherwood and the Missouri, Kansas & Texas Ry. Company of Texas, a corporation, the sum of Six Hundred and Fifty and no/100 Dollars.

Conditioned that the said Texas & Pacific Ry. Company, a corporation, Appellant, shall prosecute its said appeal with effect, and in case the judgment of the Supreme Court, or the Court of Civil Appeals, shall be against it that it shall perform its judgment, sentence or decree, and pay all such damages as said Court may award against it.

Witness our hands, this 10 day of January, A. D. 1916.

THE TEXAS & PACIFIC RY. CO.,
By GEORGE THOMPSON,
Genl. Atty.

R. H. STEWART.
E. R. SIDNEY.

Approved the 14 day of Jan'y A. D. 1916.

W. H. LOGAN,
Clerk County Court, Tarrant County,
By GEO. HARRIS, *Deputy.*

Filed January 14th, 1916. W. H. Logan, County Clerk.

(Here follows bill of costs, marked page 224.)

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Certificate of the Clerk.

THE STATE OF TEXAS,
County of Tarrant:

I, W. H. Logan, Clerk of the County Court of Tarrant County, Texas for Civil Cases, do hereby certify that the above and foregoing pages contain a true and correct copy of all the proceedings had in the trial of Cause No. 14456, styled B. Leatherwood vs. Texas & Pacific Railway Company, et al., as the same appear of record, and from the original papers on file in this office.

Witness my hand and the seal of said Court, at office, in Fort Worth, Texas, this the 31st day of March, A. D. 1916.

W. H. LOGAN,
Clerk of the County Court of Tarrant
County, Texas, for Civil Cases,
By MRS. C. R. BARDIN, Deputy.

226 THE STATE OF TEXAS,
County of Tarrant:

I, J. A. Scott, Clerk of the Court of Civil Appeals, in and for the 2nd Supreme Judicial District of Texas, hereby certify that the above and foregoing 225 pages in writing contain a true and correct copy of the transcript in cause No. 8517 Texas & Pacific Railway Company et al., appellants vs. B. Leatherwood, from the County Court of Tarrant County for Civil Cases, now on file in this office.

Given under my hand and seal of office this the 9th day of July, 1917.

[Seal Court of Civil Appeals of the State of Texas.]

J. A. SCOTT, Clerk.

227

B. LEATHERWOOD

VS.

T. & P. RY. CO. et al.

Duplicate Narrative.

Statement of Facts.

Filed Mar. 9, 1916. W. H. Logan, Clerk County Court of Tarrant County for Civil Cases.

228 In the County Court of Tarrant County, Texas, Civil Cases.

No. 14456.

B. LEATHERWOOD

VS.

TEXAS & PACIFIC RY. Co. et al.

Be it remembered that the above styled and numbered cause came on for trial before his honor, Chas. T. Prewitt, and a jury on December 21st, 1915, and that the following pages contain a full, true and correct statement of all the material facts adduced in evidence upon said trial of said cause.

Present: J. A. Templeton, for Plaintiff; George Thompson, Jr., for Defendants.

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230 A. G. Hood testified by deposition as follows: deposition taken at instance of the Texas & Pacific Ry. Co. by George C.

Taylor, notary public in and for County of Bernalillo, New Mexico, and dated September 25th, 1915.

By Plaintiff:

My name is A. G. Hood and was employed on or about October 8th, 1913 by the A. T. & S. F. Ry. as station agent at Watrous, New Mexico.

By Defendants:

As agent for the A. T. & S. F. Ry. Co. at Watrous, New Mexico, about October 8th or 9th, 1913, I had some dealings with B. Leatherwood with reference to a shipment of horses to Waco, Texas by way of El Paso and a contract was executed covering said shipment, signed by Mr. Leatherwood and myself. He signed the contract in my presence. Mr. Leatherwood wanted to go home and we signed the contract about 6:00 P. M. October 8th, dating it the 9th, with the understanding that I was to deliver it to Mr. Leatherwood's attendant as soon as the stock was loaded. It was signed by Mr. Leatherwood personally. This was about fifteen hours after the horses were penned at Watrous and about twelve hours before the horses were loaded in the cars and was delivered to his attendant only a few minutes after they were loaded. The live stock contract exhibited to me by the notary and marked Exhibit "A" has the signatures of Mr. Leatherwood and myself on same. This contract is not the original issued at the time referred to but is a carbon copy of the original issued on October 8th, 1913. I have not the original of this contract in my possession as it was given to Fred Crowder. Mr. 231 Leatherwood was given an opportunity to read this contract before he signed. I know of nothing governing this shipment but the regular contract rate, which was used and under which this shipment moved.

Answers to Cross-interrogatories by A., T. & S. F. Ry.

It is a fact that Mr. Leatherwood signed this contract in person and in my presence. Fred Crowder accompanied this car of horses from Watrous as care taker for Mr. Leatherwood. I signed the contract in person as agent for the A. T. & S. F. Ry. Co. As nearly as I can remember this contract was signed about six P. M. October 8th, 1913, and the car left, according to our records at 6:15 A. M. October 9th, 1913.

Answers to Cross-interrogatories by Plaintiff.

No one is present while my deposition is being taken and the notary says he is not employed by and has no connection with the different railroad companies in this suit. I have not been interviewed at all about this suit and have received no letters regarding same. I

am testifying from the Exhibit "A" which was shown to me and which has refreshed my memory. It is not a fact that this contract was signed after the horses were loaded, as it was signed the night before. The regular rate is the only one I recall having to govern this shipment and it was given me by the Live Stock Agent at Trinidad. Mr. Leatherwood filed claim with me to be sent to the Live Stock Agent, but I kept no copies of the papers and can't remember when it was filed, but sometime after the shipment moved. My recollection is that the amount of the claim was \$200.00. I don't know what became of the papers after they were sent to the Live Stock Agent.

232 Defendants here offer certain portions of live stock contract, referred to as Exhibit "A" in foregoing deposition, covering the carriage of plaintiff's live stock from Watrous, N. M. to Waco, Texas, as follows:

The Atchison, Topeka & Santa Fe Railway Company.

Rules and Regulations for the Transportation of Live Stock.

NOTICE.—This Railway Has Two Rates on Live Stock.

The rate given under this contract is lower than the rate made by the Railway Company and connections for the transportation of stock at carrier's risk, and without limitation of liability, and is based upon the conditions and agreements found in this contract and upon the valuations therein fixed. The shipper by accepting this condition is deemed to accept the lower rate upon the terms and conditions specified as part of this contract.

No station agent or station master of this Company has any authority to agree for the Company that cars shall be furnished at his or any other station for shipment of live stock at any special date, or that any particular kind or class of car will be furnished for such purpose, or that Live Stock will be forwarded on any particular train, or be delivered at destination at any special time or for any particular market, or to transport stock beyond the line of this Company's road. None but a general officer of the Company has power to make such contract.

This agreement made at Watrous, N. M. station Oct. 9, 1913 between and on behalf of the above named Railway Company hereinafter called the Company, and the connecting carriers severally, of the first part, and B. Leatherwood of Watrous, N. M. hereinafter called the shipper, of the second part.

233 Whereas the Company transports live stock as per rules and regulations, all of which are made a part of this contract.

Fifth. That at his or their own risk and expense the shipper will load the stock at the first named station, take care of, feed and water

and attend to same while they may be in the stock yards of the Company or lots where awaiting shipment; and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and hereby agrees that the Company shall not be liable for any loss or damages to said stock while being so in the shipper's charge, and so cared for and attended to by the shipper or his or their employes as aforesaid; and in cases where the Company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employes while so engaged, and the Company shall in no wise be liable for their acts or negligence.

Eighth. * * * The written notice herein provided for can not and shall not be waived by any person except a general officer of the company, and he only in writing. * * *

Ninth. It is further agreed that no suit or action against the Company for the recovery of any damages accruing or arising out of said shipment or of any contract pertaining to the same, or to the furnishing of facilities for such shipment, shall be sustained in any court of law or equity unless such suit or action shall be commenced within six months next after the loss or damage shall have occurred. The failure to institute suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit. * * *

Thirteenth. In making this contract, the shipper expressly acknowledges that he has had the option of making this shipment under the tariff rates either at carrier's risk or a limited liability, and that he has selected the rate and liability named herein, and expressly accepts and agrees to all the stipulations herein named. * * *

The signature of the shipper or his agent hereto is and shall be conclusive evidence that said second party fully understands and assents to all the provisions and conditions of the foregoing contract.

THE ATCHISON, TOPEKA & SANTA FE
RAILWAY COMPANY AND
CONNECTING CARRIERS SEVERALLY,

By A. G. HOOD.

B. LEATHERWOOD, *Shipper*.

Witness:

A. G. HOOD.

Contract shows car to be A. T. & S. F. 57289.

H. HANSBRO testified by deposition taken at the instance of A. T. & S. F. Ry. Co. before W. A. Chapman, notary public in and for Colfax County, New Mexico, October 18th, 1915.

By Plaintiff:

My name is H. Hansbro. I live at Raton, New Mexico and am a conductor on the A. T. & S. F. Ry. During the month of
236 October 1913, my residence and occupation were the same as at present, and have been working in that capacity since April 26th, 1905. I had something to do with the handling of car of horses in A. T. — S. F. 57289 loaded at Watrous, N. M., October 9th, 1913. I loaded them at Watrous and took them to Las Vegas as conductor of the A. T. & S. F. Railway. This shipment came into my charge at 6:20 A. M. on October 9th, 1913, and I delivered them at Las Vegas at 8:30 the same day. No switching was done by the train handling this car while it was in my possession except to pick up the car, and the car was not handled roughly when picked up. There was no unusual and unnecessary switching of the cars and train while this car was in my charge, but it was handled carefully. I have been railroading twenty five years all told and have been a conductor ever since April 26, 1905 and all the time since for the A. T. & S. F. Ry. The handling given to these horses while in my charge was the usual and customary handling and treatment given similar shipments of horses of the same kind and character while being transported from one point to another over the railroad. The train that carried this car of horses also carried merchandise and two other cars of horses. I have no recollection or record as to the condition of these horses at the time I received them, but their condition was the same when my connection with them ceased as it was when I received them. These horses were not unloaded for any purpose while in my charge. I believe someone accompanied this shipment. I had charge of them for only twenty miles and I have no record of any stop and there would be no occasion for the party in charge to look at the shipment during that time. The party in charge did not pay any railroad fare.

237 Answers to Cross-interrogatories by Plaintiff.

While my deposition is being taken there are present the notary public Wm. Chapman, the stenographer Marie Overman, L. S. Wilson, local attorney of the A. T. & S. F. I have communicated with Mr. Wilson regarding this case but don't recall any others at this time. I do not recall having received any letters regarding same. So far as I know the notary taking my deposition is not employed by the railway company. I have answered each one of the direct interrogatories as fully as I can. I have no particular recollection of this shipment of horses, but am testifying from records, from which I am refreshing my recollection. There was no complaint made while I had charge of this shipment and no switching done. I have no recollection as to when I first heard there was trouble about this shipment or by whom I was first interrogated in regard to it. I did not know that the horses were injured. There was no injury to these horses while they were in my charge that I know of and no complaint was made during that time. I did not make any report

to any one as to the condition of these horses or as to the handling of same while I had them. I did keep a record of the shipment which I turned in to the Superintendent's office, but I now have it in my possession for the purpose of giving my evidence, and it is as follows:

"A. T. & S. F. Car 57289, stock car, picked up at Watrous and set out at Las Vegas. It contained horses for El Paso, Texas. Weights are gross 71,000 tare 46,000 net 25,000. The train was an extra, engine No. 1653 and the date was October 9, 1913. I made no report of the condition of the stock."

238 You ask me how I came to inspect these horses with a caretaker in charge and whether it was day or night. My answer is that I made a day light inspection at Las Vegas when we arrived there but found nothing wrong and made no report.

These horses were not unloaded for feed and rest while I had them and there was no report made by me in regard to same.

ROBERT D. HAYNE testified by deposition taken at the instance of the A. T. & S. F. Ry. Co. before George C. Taylor, notary public in and for Bernalillo County, New Mexico, on September 24th, 1915, as follows:

By Plaintiff:

My name is Robert D. Hayne, and I reside at Abajo Stock Yards near Albuquerque, New Mexico. I am foreman of the Atchison, Topeka & Santa Fe Railway stock yards. My residence and occupation were the same during the month of October, 1913, as at present, and prior to that time I had been working at the same place for four years and eleven months. In a general way my duties consist of counting cattle, see that they were properly unloaded, fed and watered; take care of shipments, etc. I see that all horses which are unloaded at Albuquerque are properly fed and watered. I saw that the shipment referred to here, being in A. T. & S. F. car 57289 about October 9th, 1913, was properly unloaded, fed and watered and reloaded at Abajo Stock Yards. This car of horses was unloaded for feed and water at Albuquerque, New Mexico. I had something to do with feeding and watering them at that time. They were

239 unloaded in the pens at Albuquerque at ten P. M. October 9th, 1913, and were reloaded in the car at 3:05 A. M. October 10th, 1913. During the time they were in the pens they were fed five bales or four hundred pounds of alfalfa. It is not a common practice to feed alfalfa to any stock, horses or cattle, except upon orders given by parties in charge and these orders are either phoned by shippers in charge from the up town office, yard office, or personally. These horses got the feed that was given them. The stock pens at that time were clean and dry. These horses were fed and watered under my instructions. They were given all the water that was needed and the troughs were left full of water. The troughs are sufficiently big to water three cars if necessary. These pens are good dry and clean pens, size forty some odd feet by eighty odd with watering troughs sufficiently large for three cars if necessary.

These pens are supplied with plenty of water and suitable troughs to hold the water for stock to drink. These horses had free access to the water troughs and had all the water they wanted to drink. I did not see anybody in charge of these horses. There was no one in charge at the stock yards. I fed them as per orders, presumably received over the phone as I saw no one in charge. The party in charge of these horses was not present when they were reloaded. I don't know what became of him after the horses were unloaded in the pens at Albuquerque as I have no recollection of seeing him whatever. I saw this car of horses and counted them as unloaded. Each horse naturally had to pass me as they were unloaded or reloaded. My record shows that there was no exception noted as to condition. I positively saw no cripples or exceptions would have been noted for my own protection.

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Answers to Cross-interrogatories by Plaintiff.

No one is present but the notary while my deposition is being taken. I have not communicated with any one regarding same that I know of and have received no letters from attorneys that I know of. Personally I don't know whether the notary is in the employ of the railway company. I have answered every question in the direct interrogatories in full. My testimony is from my own personal records made for my own protection which show the number and condition of stock passing and feeding at yards. You ask me what I mean by unusual and unnecessary switching and jerking of the car and what makes me remember how this particular car was handled. I have not said that the car of horses was roughly handled while at the stock yards. I first learned about August 18th or 19th, 1915, that I would possibly have to give a deposition. I did not know that horses had been injured whatever. They were not injured while in my charge. You ask if party in charge made complaint at stock yards my answer is that nobody was in charge of the horses at stock yards. I have no recollection of making any report as to the condition of these horses but have what is known as form 822 sent to General Superintendent, Assistant General Live Stock Agent and keep one or two carbon copies on hand to show condition of stock as it is handled at Abajo stock yards, Albuquerque. You ask me how I came to inspect these horses when there was a caretaker with them and what sort of inspection did I make, and whether it was day or night. I answer that nobody was in charge of the horses at the stock yards. The horses were not crippled. It was night when I counted each horse as it passed me in unloading chutes, ten P. M. I made no injury report. These horses were unloaded for feed and rest at Abajo Stock Yards, and stayed there five hours, they were not injured or crippled when unloaded or reloaded. Form 822 attached.

By Defendants:

Answer to Cross-interrogatory propounded by M., K. & T. and T. & P. Railways.

The answers I have given are true and correct.

Form 822 referred to as follows:

Santa Fe.

A., T. & S. F. Ry. No. 22.

Aq. Stc. Yds. Station,

Oct. 9, 1913.

Destination El Paso. Car 57289. Check in 30 2 c, out 30 2 c. Arrived train 31 date 10/9 time 8 P. M. Swallow conductor. Set to Yards 9:40 P. M. Unloading begun 9:40 P. M. Unloading finished 10 P. M. Hour at which man in charge requests reloading. Weather No. ex. Departed; train Ex. date 10/10, time 4 A. M. Coon conductor. Condition of pens. O. K. Water and feed (hay corn etc.) 5-400# hay. Condition and kind of live stock horses (broncos), cause of delay if any, held unnecessarily long in yds. before bringing to Stc. Yds. Any rough handling or unusual switching in yard, none.

P. J. JOHN, *Agent*.
R. D. H.

Signature of other parties inspecting stock.

R. D. HAYNE.

Not know Party in charge of stock.
Not at Yds. when reloaded.

Also the following letter attached to deposition.

"Abajo Stoc. Yds. 8, 19, '15.

Mr. P. J. Johnson, Agent, City.

242 DEAR SIR: Noting the attached. I can not personally say why this car was held so long in yds. Was fed 5 bales 400 # alfalfa. I myself know that str. had plenty of water and 5 bales of alfalfa. My recollection is that party in chg. of horses came to the stk. yds. on swit-h engi. gave his order for 5 bales of alfalfa. (Otherwise we would have fed P hay as we do feed alfalfa only on orders given by shipper in charge) and then went back on same eng. not giving me time to get his name or where horses were going to. Was not at stk. yds. when reloaded (had another car of horses at same time for El Paso and under same conditions party in chg.

doing likewise). I personally know that horses got all the water wanted and had 5 bales alfalfa and had 5 hrs. rest in pen #2.

Very Respt.,

R. D. HAYNE.

JOHN H. SWALLOW testified by deposition taken at instance of A. T. & S. F. Ry. before George C. Taylor, notary public in and for Bernalillo county, New Mexico, September 24th, 1915, as follows:

By Plaintiff:

My name is John H. Swallow. I live at East Las Vegas, New Mexico, and am a conductor for the A. T. & S. F. Ry. In the month of October, 1913, I was working in same capacity between Las Vegas and Albuquerque and resided at same place as at present. I have been working about eleven years as a conductor. I was the conductor in charge of the train that carried car A. T. S. F. 57289 containing horses on October 9th, 1913, from Las Vegas to Albuquerque, New Mexico. I took charge of train at 9:50 A. M. 243 at Las Vegas and departed from there at 10:20, arriving at Albuquerque 8:00 P. M. same date, making nine hours and forty minutes on the run, which is a good run over a mountain district. They were delivered by me in the lower yard at Albuquerque at time stated, 8:00 P. M. No switching was done with this train en route between Las Vegas and Albuquerque. These horses were handled very smoothly while in my charge over entire district, as there is no notation in train book as to rough handling. There was no unusual or unnecessary jerking or switching of the car while in my charge to my knowledge. I have had thirty one years' experience railroading. I went to work for the Santa Fe in April 1898 as a brakeman and was promoted to conductor in 1902. I have worked for the Northern Pacific, Wisconsin Central, Chicago, Milwaukee & Lake Shore and Michigan Central and the A. T. & S. F. The handling given this shipment of horses while in my charge was the usual and customary handling and treatment given similar shipments of horses of the same kind and character while being transported from one point to another over the railroad. It was handled just the same as other stock in car load lots or train loads. It was first class movement. The other freight contained in this train with the horses was perishables and merchandise. These horses were just in fair condition when received by me and they were in the same condition when my connection with them ceased as they were when I received them. These horses were not unloaded en route while I had them in charge. I cannot state whether there was a man in charge as there is no record in my train book showing man in charge. If there was one in charge he had plenty of opportunity at watering coaling stations to to give stock proper 244 attention. Trainmen's instructions while handling stock and no one is in charge is to look after them and see they are kept in good condition over entire district.

By Defendants:

Answer to Cross-interrogatory by M., K. & T. and T. & P. Railways.

The answers I have given are true and correct.

By Plaintiff:

Answers to Cross-interrogatories by Plaintiff.

I have not received any letters or communications regarding my testimony in this case excepting the letter attached marked Exhibit "A." No one but the notary is present while my deposition is being taken, and I don't know anything about his as I never saw him before. I have answered in full each question propounded in direct interrogatories. My testimony is based on the records as I have no independent recollection. My train book is my only record, and it does not show any rough handling en route. There is no record in the train book of any complaint. I first learned there was trouble about this shipment when I was notified to come up to the office to give my statement by Company lawyer Mr. Reid. I was never interrogated with reference to shipment. There is no record in the train book to effect that horses were injured while in my charge. You ask if I made any report as to the condition of these horses or as to the handling while I had them and what I did with such report. We make a form 22 report leaving terminals of every car and contents in train. This record is kept in trainmaster's office in Las Vegas. You ask if I made a record of my run with these horses showing how they were handled and if so what I did with it. My answer is that the only record I have of stock when received 245 and when delivered is my train book. Our wheel report to auditor only shows car number, contents and destination, gross, tare and net weight. I do not have train book with me, but looked it over when I was notified to come to Albuquerque. I did not make any inspection of these horses that I know of, as there is no record in train book to that effect. The stock was not loaded or unloaded while in my charge.

Exhibit A referred to in above deposition, is as follows:

2/3/14.

J. C. Barton.

DEAR SIR: 57289 handled by me 10/9. This stock received no rough handling while in my charge, made a good run 9 hours and 40 m. Vg. to Aq.

Yours resp.,

J. H. SWALLOW.

C. C. COON testified by deposition taken at instance of A. T. & S. F. Ry. by George C. Taylor, notary public in and for Bernalillo County, New Mexico, on 21st day of September, 1915, as follows:

By Plaintiff:

My name is C. C. Coon, my residence San Marcial, New Mexico, and am a conductor for the A. T. & S. F. Ry. In October 1913 my residence was the same as at present and I was then freight conductor for the said railroad. Prior to October 1913, I had been working in such capacity for about one year. I handled A. T. S. F. 57289

Abajo to San Marcial, New Mexico, October 10th, 1913, in
246 extra train No. 1149 as freight conductor. This shipment

came into my charge at 4:00 A. M. October 10th, 1913, at Abajo and I arrived at San Marcial 12:40 P. M. same date. There was no unusual delay en route and it was considered a good run for this train. I delivered the car at San Marcial at 12:40 P. M. October 10th, 1913. We made one switch at Belen, but no other switching en route with the stock. When we did this switching the horses in this car were third car from engine. We had hold of fifteen cars and set out seven in one bunch and returned other portion to train. There was no rough handling. There was no unusual or unnecessary switching of the cars and train while the shipment was in my charge. These horses were handled with extreme care while in my charge. There was no unusual or unnecessary jerking or switching of the car containing this shipment while it was in my charge. Up to the present time I have had about sixteen years' experience in railroading. I was brakeman and conductor for thirteen years with the C. B. & Q. prior to coming with Santa Fe and have been conductor for Santa Fe since severing my connection with C. B. & Q. October 8th, 1912. These horses were handled with extreme care while in my charge, the same as all shipments of live stock. The train containing this car was a freight train consisting of both loads and empties, of stock, red ball and dead freight; flour, potatoes, coal, coke, merchandise, wool and live stock. These horses were apparently in good condition at the time I received them and were apparently in good condition when my connection with them ceased. They were all on their feet on leaving Abajo and on arriving at San Marcial and none were down en route. These horses were not un-

loaded for any purpose while in my charge. There was a
247 man in charge of the shipment but I can't say whether he was the owner or not. This man in charge was given an opportunity to look after and attend the horses while they were being transported over my division. We were at Belen one hour and Socorro forty minutes which would give ample time to inspect stock, being near rear end of train. I am sure this party looked after and attended to the horses in question while we were at Belen.

By Defendants:

In answer to cross interrogatory propounded by the M. K. & T. and T. & P. Railways:

The answers I have given were all true and correct.

By Plaintiff:

In answer to cross-interrogatories by plaintiff:

No one is present while my deposition is being taken by the notary. No one has communicated with me as to what my testimony would be in the case and the only letter I have received regarding same is from the trainmaster which is attached marked Exhibit A. The notary taking my deposition is not employed by the railroad in any way to my knowledge. I have answered each question in the direct interrogatories in full. My testimony is based on records wholly. There was no unnecessary switching while the shipment was in my charge and I have no record of any complaints. I keep all records of complaints. I first heard there was trouble concerning this shipment on February 2nd, 1914, when the claim papers first came to me. These horses were not injured while they were in my charge and there were no complaints made as to rough handling. I did not make any report to any one as to the
248 condition of these horses or as to my handling while I had them in charge. You ask me if I made a record of the run with these horses showing how they were handled while I had them and where was the report made and what did I do with it. I made a record of the train which I suppose is on file in the car accountant's office in Topeka, Kansas, and I have not access to it. I attach copy of train book record from which car accountant's record was made. See Exhibit B attached hereto. You ask me how I came to inspect these horses when a care taker was with them and whether it was in day or night time. My answer is it was daylight. It is our duty to keep close tab on shipments of live stock. If there are any unusual conditions I always notify man in charge of stock. These horses were not unloaded for feed or rest while they were in my charge.

Exhibit A referred to in foregoing deposition is as follows:

"Re Taking Depositions in Case of Leatherwood vs. The Texas & Pacific R. R. et al.

File 2.

San Marcial,

Sept. 17, 1915.

Mr. C. C. Coon, Conductor, San Marcial; Mr. W. F. Faust, Conductor, San Marcial.

DEAR SIRS: Solicitor Reid of Albuquerque desires to take deposition from you gentlemen in suit brought by B. Leatherwood against the Texas & Pacific R. R. Co. and the Atchison, Topeka & Santa Fe Ry. Co. for damage to shipment of horses shipped from Watrous New Mexico, October 9th, 1913, to Waco, Texas via El Paso. Both of you gentlemen will report to Mr. Reid, the first time you are in

249 Albuquerque and advise the undersigned. Mr. Johnson,
agent at Albuquerque can direct you to Mr. Reid's office,
Yours truly,

B. A. WEST, *Trainmaster.*

Claim 22054.

San Marcial, 2/9/14.

Mr. B. A. West, T. M., S. M.

DEAR SIR: Relative to the attd. In reply wish to state that I have
no record of any complaints of stk. man or rough handling while in
my charge.

Yours truly,

C. C. COON.

Exhibit B referred to in foregoing deposition is as follows:

Form 808—Standard.

Conductor C. C. Coon, arrived 1443 at 2:40 P. M. 10/10/1913.

Brakeman O. F. Black, R. B. Bonar.

Train Ex. W. Engine 1149, left 1340 at 4:25 A. M. 10/10/1913.

Engine man Wm. Shakespeare, fireman I. N. Austin.

Car initial A number 57289, kind S from 1340 to 1443 contents
horses, final destination 1594 weight gross 665 tare 450 net 215.

(Above is entire reference to horses in question in train book referred to.)

250 W. F. FAUST testified by deposition taken at instance of A.
T. & S. F. Ry. before George C. Taylor, notary public in and
for Bernalillo County, New Mexico on September 24th, 1915;
as follows:

By Plaintiff:

My name is William F. Faust, I reside at San Marcial, New Mexico and am a conductor for the A. T. & S. F. Ry. In October 1913 I resided at same place and was freight conductor for the same railroad. I was employed on the G. H. & S. A. nine years and eight months in the capacity of brakeman and extra freight conductor and have been employed by the Santa Fe since August 31st, 1912. I was in charge of the train containing A. T. S. F. 57289 from San Marcial to El Paso. It came into my charge at San Marcial at 5:00 P. M. on the 10th day of October, 1913, and remained in my charge until arrival at El Paso at three A. M. October 11th, a total of ten hours. You ask me to state what, if any switching was done by the train handling this shipment while it was in my possession; at Rincon I set out one water car which was the 16th car or head car in the train, having only sixteen cars in the train, and picked up at Rincon three cars; at Medler I set out two cars; at Dona Ana I picked up two cars;

Las Cruces I set out one car and picked up one car; at Mesilla Park I picked up two cars; at La Tuna I picked up six cars and set out one and at any time during those movements the stock was not moved only in making regular stop because in each instance I left eleven cars ahead of the stock on the train each time we stopped to do any work. Did not use any portion of the train the stock was in in switching at any time as stock was third and fourth car ahead of caboose. There was no switching of the stock or that portion of the

train containing the stock while it was in my charge. *There*
 251 *was no switching of the stock or that portion of the train con-*
taining the stock while it was in my charge. At each station mentioned the rear portion of the train consisting of thirteen cars were standing still all the time we stopped at the station until we had done our switching, coupled up air and were ready to leave town. That portion of the train just mentioned consisted of thirteen cars was not moved nor coupled into by switching cars. I arrived at El Paso with twenty five cars. These horses were not handled roughly while in my charge. We consumed ten hours San Marcial to El Paso which is an exceedingly good run over this division; as a general rule trains in that movement consume from twelve to fourteen and a half hours. There was no jerking of the train as we only had a short train and there would be no necessity for any jerking and no switching done with rear portion of train where stock was located, at any point. I have had about eighteen years' experience in rail-roading. I have worked nine years and eight months on the G. H. & S. A. as conductor and from August 30th, 1912 to present with A. T. & S. F. as freight conductor. The handling given this shipment of horses while in my charge was the usual and customary handling and treatment given a similar shipment of horses of the same kind and character while being transported from one point to another over the railroad. It is not customary to run special trains with two or three cars of stock. The rest of this train consisted of coal, hay and merchandise. As far as I know these horses were in good condition when I took charge of them and were in good condition when my connection with their handling ceased, from the notation on train book. There was no complaint from the man in charge. These horses were not unloaded for any purpose while

252 they were in my charge. They were accompanied by some party but would not state positively whether they were accompanied by the owner or some one for him. He had an opportunity to look after his horses at Rincon, Dona Ana, Las Cruces, Mesilla Park and La Tuna. These stock cars were only the third and fourth ahead of the caboose, but I could not tell whether he looked after them or not as my occupation required me to be on the head end of the train at every stop where we had work to do.

By Defendants:

Answer to Cross-interrogatory by M., K. & T. and T. & P. Railways.

The answers I have made are true and correct.

By Plaintiff:

Answer- to Cross-interrogatories by Plaintiff.

The attached letter marked Exhibit A is the only statement I have ever called on to make or have made. Nobody but notary taking this deposition is present while same is being taken. I don't know whether the notary is employed in any way by the railroad. I have answered all the questions in the direct interrogatories fully to the best of my ability and recollection. I seem to recollect this shipment on account of getting into El Paso at 3:00 A. M. instead of 8:00 to 9:00 A. M. as usual, and telling the man in charge of stock where the T. & P. station was and that the switch engines did not go to work until 6:00 A. M. The balance of my testimony is based on records which I have in my train book. There was no complaint made whatever. I know there was no jerking or rough handling on account of unusually short train, handling all told thirty cars between San Marcial and El Paso, leaving San Marcial with sixteen cars, arriving at El Paso with twenty five cars, whereas usual- it is customary to handle from sixty to eighty five cars, between Dona Ana and El Paso; therefore I know there was no rough handling on account of having only these few cars and no accidents of any nature on any part of the division. I first learned about this shipment being in trouble when I was called on by trainmaster on February 9th, 1914, for a record pertaining to the handling of A. T. S. F. car 57289. My reply is attached, see Exhibit A. No complaint was made by the man in charge either by time or rough handling and none of the animals in question were injured, to my knowledge, either before I received them or while they were in my charge. I did not make a report to any one as to the condition of these horses or as to the handling of same, only kept a record in my train book until requested for a statement regarding handling of these horses by the train master. You ask if I made or kept a record of my run with these horses, showing how they were handled while I had them and if so what I did with the record I so made. There are two records made, one in form of wheel report, which was mailed to car accountant on October 11th, 1913, showing number of cars handled, contents and weights, handled to and from. I keep no copy of these reports. The other record *record* referred — was in form of delay report which was sent to train master at San Marcial by wire from El Paso showing where train was delayed, how long and for what purpose. The original copy, I presume, is on file at El Paso, copy being on file at San Marcial. Herewith I attach a true copy of record of this train taken from train book. See Exhibit B. You ask me how I came to inspect the stock when there was a caretaker with them, what sort of an inspection did I make and whether in day or
254 night time. My answer is that we don't inspect stock. All we go by is to look at horses and see if all are standing on their feet and none down. It was daylight when we left San Marcial with all horses on their feet. It is always customary and practiced by me that whenever I find stock lying down in such a manner as to

cause other stock to fall over them to notify person in charge and allow him time to get stock up on their feet before moving train. I cannot recall of seeing any horses down at any time on any portion of the division. These horses were not unloaded, fed or watered while in my charge, but were left at El Paso where my run terminated.

Exhibit A referred to in foregoing deposition is as follows:

San Marcial, 2/9/1914.

Mr. B. A. West, San Marcial.

DEAR SIR: Replying to your letter of Feb. 7th, claim No. 22054, A. T. 57289 horses Watrous to El Paso Oct. 10th, 1913, Ex. 1126. Will advise that my record shows 10 hours on road San Marcial to El Paso. No exception noted on W. N. and no rough handling en route, notation in train book shows horses arrived at El Paso in good condition, no complaint made by man in charge.

Yours truly,

W. F. FAUST.

Exhibit B referred to in foregoing deposition is as follows:

Form 808—Standard.

Train Ex. West, Engine 1126, left 1443 at 5:00 P. M. 10/10/1913.
Engineman E. Mundis, Fireman E. M. Scarbrough.
255 Conductor Faust, Arrived 1594 at 3:00 A. M. 10/11/1913.
Brakeman P. J. Savage, J. Stanley.

Car initial A. T. 57289, kind S, top 33, from 1443 to 1594, contents horses final destination 1594, weight gross 660 tare 460 net 200.

Remarks: Stock O. K. at 1594.

C. D. JOHNSON testified by deposition taken at instance of A. T. & S. F. Ry. Co. before Laura J. Bond, notary public in and for El Paso County, Texas October 2nd, 1915, as follows:

By Plaintiff:

My name is C. D. Johnson. I reside in El Paso, Texas, and am local freight agent for the Texas & Pacific Ry. Co. As such agent I have in my possession records of shipments of live stock made through the Texas & Pacific Ry. Co. from El Paso during the month of October, 1913. They were made under my direction and supervision and are true and correct. These records were made in the general course of business of my office and are the permanent records of the Texas & Pacific Ry. Co. pertaining to live stock shipments from El Paso, Texas. The shipment of horses mentioned, contained in A. T. S. F. 57289 from Watrous, N. M. to Waco, Texas via El Paso and the Texas & Pacific about October 9th, 1913 were received from the Rio Grande, El Paso & Santa Fe

by the Texas & Pacific Ry. at 10:10 A. M. October 11th, 1913. In reply to your question as to condition will say that we have no record of any exceptions being noted against the shipment
256 when received. As stated, we have no record of any injured horses in this shipment. These horses were unloaded in the Texas & Pacific stock pens at 11:00 A. M. October 11th, 1913 and reloaded into the same car A. T. & S. F. 57289 at 12:00 midnight, October 11th, 1913, and forwarded east at 2:00 A. M. October 12th, 1913, leaving El Paso at that time.

Answers to Cross-interrogatories by the T. & P. and M., K. & T. Railway Companies.

I did not make the records I am testifying from, but they were made under my supervision and direction. These records were made by the yard clerk, as to time of receipt of car. The unloading and loading record was made by the stock clerk. Both records were made at the time of handling of the shipment in question.

Answers to Cross-interrogatories by Plaintiff.

These horses were received at 10:10 A. M. October 11th, 1913, and were reloaded at 12:00 midnight same day and forwarded east at 2:00 A. M. October 12th, 1915. We fed these horses five bales of oat hay and watered them.

FRED CROWDER testified by deposition taken at instance of plaintiff by Chas. G. Hedgcock, a notary public in and for Guadalupe County, New Mexico on May 1st, 1915, as follows:

By Plaintiff:

My name is Fred Crowder. My post office address is Santa Rosa, Guadalupe County, New Mexico and I am working for B.
257 Leatherwood near Santa Rosa handling horses and cattle.

I have had twelve years' experience in handling, buying and shipping horses, ten years in Texas and two years in New Mexico. I have been in the stock business constantly for the last twelve years. I do know about the shipment of horses made by B. Leatherwood about the 9th of October, 1913 from Watrous, New Mexico to Waco, Texas and had something to do with the shipment. I helped to load thirty two head of horses on the cars of the Santa Fe Ry. Co. at Watrous, N. M. I also helped bring the horses in to the stock pens of the railroad company at that place where they were delivered to the Santa Fe Ry. and loaded into its cars. I went with these horses all the way from Watrous, N. M. to Waco, Texas. In that trip they went over the Santa Fe from Watrous, N. M. to El Paso, Texas, over the Texas & Pacific Ry. from El Paso to Fort Worth and the Missouri, Kansas & Texas Road received the horses at Fort Worth and carried them from Fort Worth to Waco, Texas. I saw these horses during the whole trip as I would get

out every time the train stopped and look at them. That is when the train stopped long enough for me to go back to them. It was a good many times and it would be impossible for me to state just how many. I went all the way with them and the condition of the horses was good until they got to El Paso and between El Paso, Texas and Big Spring, Texas five head were hurt. I know one sorrel mare was hurt between the above points and I also think that four others were hurt between the same points, I am pretty sure they were. I do know about a mare out of this shipment getting her foot through the car and the conductor and I sawed the plank in two so she could get up. She was crippled

at that time and was when I sold her. The bottom plank
258 on the side of the car was broken and she had her foot down in the hole. This was about Toyah, Texas, I think, that

I discovered she was down and the conductor and I and old man Jim Kelly went and got her out. She was not practically worth anything when she got to Waco, but was seriously crippled. The injury lowered her value about sixty five dollars at least. As far as I could tell the main injury was in her right hind leg. Four more of the horses were seriously injured and to the best of my recollection they were injured between El Paso, Texas and Big Spring, Texas. One bay mare was skinned all over, one gray mare was seriously hurt in the right hind leg, one blue horse had a big knee, one of his knees bunged up and the sorrel horse had a big knot on his face, bigger than your two fists. The bay mare was bruised all over and the gray mare also badly bruised. The blue horse had an awful knee on him and we sold the horses in this condition. These horses were crippled. Five horses were crippled as I have described and the injuries would reduce their value at least one half. I know the market value of such horses as these and what it would have been if they had been properly handled and delivered by the railway company at the time they should have been delivered at Waco. It would have been \$100.00 per head. The market value of those that were crippled when they arrived at Waco was \$35.00 per head on an average. These horses I mention were damaged about \$65.00 a head over and above what they would have been damaged if they had been handled in a reasonable and usual way on the trip. I know what reasonable and

usual treatment and handling of a shipment of horses over
259 a railroad consists of. You ask me to describe the entire trip

I went with the horses. It has been two years and I can't exactly remember the entire trip but from Watrous, N. M. to El Paso, Texas it was as usual and from El Paso to Waco, Texas it was bad. The horses were handled roughly from El Paso to Waco, Texas, and were jolted around and bruised. I do not remember as to the handling of the trains, as I cannot remember or describe the starting, stopping or switching of them. The horses injured were all in the same car and it was in bad condition owing to the fact that one of the planks on the side and at the bottom was broken, leaving a good sized hole. The horses were not fed properly from Big Spring, Texas to Waco, Texas, and also were not

watered between those points. They went, to my best recollection, for forty two hours without feed or water. I don't know anything about the claim for these damages being presented.

Answers to Cross-interrogatories by the Texas & Pacific Ry. Co.

I did accompany this shipment of horses from Watrous, New Mexico to Waco, Texas, about October 9th, 1913.

By Defendant:

I obtained from the railway company's agent at Watrous, N. M. a contract of shipment covering the carriage of these horses from Watrous, New Mexico to Waco, Texas and turned it over to Mr. Leatherwood.

By Plaintiff:

I was with the shipment of horses on this trip when same arrived at El Paso and when they left El Paso on the Texas & Pacific Ry. and was with them from El Paso to Fort Worth, Texas. These horses were injured between El Paso, Texas and Fort Worth,

260 Texas. I also accompanied the shipment of horses between Fort Worth and Waco on the M. K. & T. of Texas. You ask if it is not a fact that none of these animals were damaged while en route from Fort Worth to Waco over the M. K. & T. of Texas and my answer is they were injured and damaged to some extent by reason of the fact that they were without food and water between Big Spring, Texas and Waco, Texas. I think the five horses were injured near Toyah, Texas, one of the horses, a sorrel mare, got her foot through a hole in the side of the car and was badly crippled; a bay mare was skinned and bruised all over; a gray mare was hurt in her right hind leg; a blue horse got a big knee; a sorrel horse was hurt in the face. They were all knocked around considerably. Outside of their being deprived of food and water there were none of the horses crippled, to the best of my knowledge, between Fort Worth and Waco. I think all these horses were crippled at Toyah, Texas, because the sorrel mare was fastened down in the car and then they were thrown about by the train. There were thirty two horses in the car from El Paso to Fort Worth while on the T. & P. and also the same number between Fort Worth and Waco on the M. K. & T. of Texas. The average weight of these thirty two horses was 900 pounds and average size was 14½ to 16 hands in height. Their ages were from three to seven years old and they were all gentle, broken horses. These horses would not bite and kick each other while en route from El Paso to Fort Worth and from Fort Worth to Waco any more than any other gentle horses. Of course when one horse is thrown down they would fall over one another and get down in the car and the one caught in the car would, no
261 doubt, struggle and kick to free himself and the starting and stopping of the train would cause them to fall over one another. While these horses were being handled between

El Paso and Fort Worth by the T. & P. I rode in the caboose while the train was moving. Based upon my experience in handling horses while being carried by railway companies in Texas, I would say of course there is some damage to horses in being handled by a train in switching the cars and making up trains en route on account of the usual jerking and bumping of the train, but not as much as there was in this case.

By Defendant:

I don't know that there was any more bumping and jerking than is usually and customarily done by the railway companies in Texas while handling stock and cattle for a like distance while the horses were being handled from El Paso to Fort Worth by the T. & P. Company.

By Plaintiff:

The signature on Exhibit A shown me by the notary is mine. I signed it at Baird, Texas, but the facts shown in that statement are not correct as to the run between El Paso Texas and Big Spring, Texas, and the horses were crippled and injured at the time this statement was signed. I signed the statement at Baird for the reason that the conductor of the train wanted it to be shown that the injuries had not taken place on his run, as he did not want to be blamed for them, and I signed the statement for that purpose only. The facts were that the horses were crippled up at the time I signed the statement. The signature shown me on Exhibit B by the notary is mine. This shows the shipment of horses left Baird at 6:30 A. M. on October 14th, 1913 and arrived at Fort Worth at 3:40 P. M. same date and I signed it just before arriving at Fort Worth. The horses were crippled and injured at the time I signed it and I signed it for the same reason I did Exhibit A, merely to show that the injuries had not taken place on the run from Baird to Fort Worth. It is not a fact
262 that the horses involved in this shipment were in good condition and free from injury when they reached Fort Worth, nor is it true the horses were in good condition and free from injury when delivered at Waco by the M. K. & T. of Texas. I have known the plaintiff in this case about seven years and have worked for him the past two years in capacity of foreman.

263 B. LEATHERWOOD plaintiff, testified by deposition, taken by Chas. G. Hedgecock, a notary public in and for Guadalupe County, New Mexico, on May 1st, 1915, as follows:

By Plaintiff:

264 My name is B. Leatherwood and am in business near Santa Rosa, New Mexico, and live near that place. My business is stock raising and I have had fifteen years' experience in handling, buying and shipping horses. I know something about the shipment of horses I made from Watrous, N. M. to Waco, Texas

about October 9th, 1913. I helped to put the horses in the stock pen and helped to load them into the cars. I delivered these horses to the Santa Fe Railroad Co. and loaded them into the cars of the Santa Fe Railroad Company. I did not go with the horses any part of the trip. All these horses were in good condition in every way when I shipped them at Watrous, N. M., and that was the last time I saw them. I don't know anything about a mare getting her foot caught in a car except what has been told to me, nor do I know anything about the other horses being injured except by hearsay. I know what the market value of these horses or such horses as these would have been if properly handled and delivered by the Railway Company at Waco at the time they should have been delivered. They would have been worth \$100.00 per head on an average. I don't know what the market value of the horses was in the condition they were delivered at Waco as I did not see them. I cannot say how much the horses were damaged, if anything, over and above what they would have been damaged had they been handled in a reasonable and usual way on the trip. I know what reasonable and usual treatment and handling of horses over a railroad consists of. I know nothing about the trip. I presented a claim for damages to the railroad company in this case for \$200.00. I cannot remember the date but it was within a very short time after the horses were injured. It was presented with- a very few weeks and the railroad company declined the claim.

265 Answers to Cross-interrogatories by the Texas & Pacific Railway Company.

I did not accompany the horses on this trip from Watrous, N. M. to Waco, Texas, and I did not know anything about the handling of the horses en route except what Fred Crowder told me after the trip was completed. I bought these horses from different parties and paid different prices for them. I bought some of them from Leigh Hand, some from Murray Carleton, Jr. I paid from \$40.00 to \$80.00 for the horses included in the shipment, but it is impossible for me to specify just which horses were bought at a particular price. I paid \$80.00 for most of the horses in the shipment. It is not a fact that I never gave the railroad company notice of my claim for damages on this shipment. I gave the railroad company notice of my claim for damage shortly after the damage occurred, but I cannot remember the exact date. I notified the agent of the Santa Fe Railroad Company at Watrous, N. M. You ask me how I know that one of the animals that was loaded had her feet cut in the car and was badly injured, and my answer is I don't know any more than I was told. I did not know that five other animals were badly crippled and four others badly hurt in the shipment of whether they had feed and proper care in the shipment from Watrous, N. M., except just what I have been told. I was not in Waco, Texas, when the horses reached there. I do not know who these animals were sold to at Waco, nor how long after they reached there. I put in my claim

for \$200.00 to the Santa Fe Company. Fred Crowder handled the shipment for me.

266 By Defendant:

I do not live in Fort Worth, Tarrant County, Texas and have never lived there.

By Plaintiff:

I am suing the Texas & Pacific in Tarrant County because I have more confidence in the Texas Courts and expect to get justice there.

F. S. BROOKS testified by deposition taken at instance of plaintiff by Paul Koontz, notary public in and for Jackson County, Missouri, on September 7th, 1915.

By Plaintiff:

My name is F. S. Brooks. My age is forty two and I am General Live Stock Agent for the Atchison, Topeka & Santa Fe Railway Company. I reside at Kansas City, Mo. My business connection in the fall of 1913 and continuing on through 1914 was the same as stated above. My duties at that time and now consist of the supervision of live stock traffic and loss and damage live stock claims. This office received on January 16th, 1914, a letter from H. S. Van Slyke, Assistant General Live Stock Agent A. T. & S. F. Ry. La Junta, Colorado, dated January 13th, enclosing letter from B. Leatherwood with Waco M. K. & T. of Texas paid freight bill No. F-940 of October 15th, 1913, for shipment of horses delivered to T. & P. at El Paso in A. T. 57289 on R. G. & E. P. Pro. No. 1011 of October 11th, 1913. It was claimed damage occurred on T. & P.

Railway. Claim was in the sum of \$200.00. After this claim 267 was received at my office we wrote R. E. Williams, Auditor of the T. & P. at Dallas, requesting investigation, at the same time asking that they furnish advance notice of claim to M. K. & T. and advise with respect to disposition of claim for account of T. & P. and M. K. & T. This letter was dated January 26th, 1914. I cannot say personally what report the T. & P. made to this Company as the investigation papers of the T. & P. have been detached from the claim file by that Company to use in making defense of suit. I should judge, however, that the advice of the T. & P. Railway indicated no liability since this fact was communicated to Mr. Leatherwood by my office May 29th, 1914. The claim was handled with the T. & P. Company by correspondence. I have already said the correspondence of the T. & P. Railway has been detached from the file. However I attach a copy of letter addressed to R. E. Williams, Auditor at Dallas, dated January 26th, 1914, marked Exhibit "A." The T. & P. correspondence is in the possession of that Company. In reply to your question whether or not the correspondence shows how the claim was handled will say that the letter to R. E. Williams which I have referred to shows how the claim was handled by this office. I have already said that claim was declined in letter from this office to Mr. Leatherwood of May 29th, 1914.

Exhibit "A" referred to in foregoing deposition, is as follows:

Claim 22054.

January 26th, 1914.

Mr. R. E. Williams, Auditor, Dallas, Texas.

268 DEAR SIR: Claim is for damage to horses. From claimant's statements it would appear that damage resulted while in your possession and that of your connection east.

Please investigate, furnishing advance notice of claim to the M., K. & T. and advise with respect to disposition of claim for your account and that of the M., K. & T.

Yours truly,

F. S. BROOKS.

A. J. BIARD testified by deposition taken at instance of plaintiff by H. C. Jarrel, notary public in and for Dallas County, Texas, on September 28th, 1915.

By Plaintiff:

My name is A. J. Biard. I am forty one years old and live in Dallas, Texas. At present I am Assistant Auditor of the Texas & Pacific Ry. Co. In the fall and winter of 1913-1914 and spring of 1914 I was Chief Clerk to Auditor of the Texas & Pacific Ry. Co. As Assistant Auditor I have general supervision over the accounts of the Company. The claim growing out of shipment of a car of horses by B. Leatherwood on October 9th, 1913, from Watrous, N. M. to Waco, Texas was referred to me by F. F. Brooks, General Live Stock Agent of the A. T. & S. F. under his number 22054. It was referred to my office for investigation and the claim was investigated by the freight claim department of the T. & P., over which I have
269 jurisdiction. The records show this claim was received from the A. T. & S. F. January 30th, 1914, and proper investigation was made by the T. & P. Ry. between January 30th, 1914, and May 6th, 1914. This consisted of calling for reports from all persons handling the shipment. The Santa Fe was advised that handling records were clear, no exceptions noted on delivery. By this I mean the T. & P. had no record of damages while handling the shipment. This report was made to the Santa Fe on May 6th, 1914. The result of the investigation over the T. & P. showed that the handling of the shipment was without defects. This claim was referred by our Company to the proper authorities of the M. K. & T. of Texas for investigation and report. I am unable to give the exact date of this but it was some time between February 17th and May 5th, 1914. Our records do not indicate the report that Company made on the claim. I am unable to say when such report was made or whether the claim was allowed or rejected by that Company. You ask what records my Company made or kept of the handling of this claim and to attach such records. I cannot attach copies of these records because they are all in the hands of Thompson & Barwise, the attorneys

representing this Company. The records were made in the manner I have heretofore stated. Reports were made by the different conductors at the time of the movement of the stock and were made to the Division Superintendent. These reports are not in my office but are attached to investigation papers in the hands of our local attorneys. These reports show the condition of the horses on each division of the Road.

270 Answers to Cross-interrogatory by the A., T. & S. F. Ry. Co.

We understood at the time claim was referred to the Texas & Pacific Ry. Co. that plaintiff did not claim his stock suffered any damage while in transportation with the Santa Fe, but that the claim for damages was based on the handling of the T. & P. Company.

Answers to Cross-interrogatories Propounded by Defendant.

In answer to these various cross interrogatories will state that the original papers are in the possession of Thompson & Barwise and I cannot answer without referring to same for I have no copies of the papers mentioned in the various cross interrogatories.

Mr. Templeton: We offer in evidence the file mark on the original petition which shows suit was brought March 2nd, 1915.

Plaintiff rests.

Agreement.

Counsel for defendant T. & P. Ry. Co. and the M. K. & T. Ry. Co. of Texas, agreed that when plaintiff's horses reached El Paso and were delivered to the T. & P. Ry. Co. to be carried on to the final destination, Waco, that the T. & P. Ry. Co. refused to carry the shipment under the original Santa Fe contract executed at Watrous, N. M. and covering the carriage from Watrous, N. M. to Waco, Tex. but required the execution of a T. & P. contract, covering the carriage of the shipment from El Paso to Waco, Texas, which was executed by shipper's agent who signed the T. & P. Ry. Co. at El Paso. Likewise when the shipment reached Ft. Worth, Texas, the M. K. & T. Ry. Co. of Tex. refused to carry the shipment under the original Santa Fe contract or the T. & P. contract referred to, but required the execution of a M. K. & T. Ry. Co. of Tex. contract covering the carriage of the shipment from Fort Worth to Waco, Texas which was executed by shipper's agent who signed the M. K & T. Ry. Co. of Tex. contract at Ft. Worth.

271 J. H. KELLY testified by deposition taken at instance of plaintiff by Albin J. Thuli, Notary public in and for Mora County, New Mexico, on April 30th, 1915.

By Defendants:

My name is J. H. Kelly. I live in Watrous, New Mexico and am a cattle, horse and mule man. I have handled cattle, horses and

mules all my life. I know about the shipment of horses made by B. Leatherwood from Watrous, New Mexico about October 9th, 1913. Fred Crowder was in charge of the horses. I had nothing to do with the delivery of the horses to the railway company and had nothing to do with their loading. I went with these horses from Watrous New Mexico to Abilene, Texas. During my part of the trip we went over the Santa Fe from Watrous, N. M. to El Paso, Texas. The Texas & Pacific took them at El Paso and carried them as far as Abilene, that I know of. I saw these horses often between Watrous, N. M. and Big Spring, Texas. The horses were in good condition when loaded at El Paso, Texas, but one horse was crippled when we arrived at Big Spring, Texas. I saw one mare out of this lot have her foot through the car and she was hurt so much that I would not have made an offer for her at all. Up to Big Spring the mare was the only horse that was damaged that I know of. The value of the horses in the car run from forty to one hundred and twenty-five dollars per head. I was well posted on the market value of horses at that time. I did not go with the horses to Waco. When I last saw the horses at Big Springs one mare was damaged so much she was practically worthless. I do not recall the exact number of horses. I

272 certainly do know how horses should be handled while being shipped for I have shipped them frequently for the last fifteen years. You ask me to describe the entire trip as far as I went with the horses. My answer is that up to Abilene Texas, the horses were handled reasonably well. The horses stood the trip O. K. except this one mare. There were a few rough starts and stops. I do not recall anything particularly about the car in which the mare was hurt and as long as I was with them the horses were properly fed and watered along the road.

Answers to Cross-interrogatories by Defendants.

I accompanied this shipment only as far as Abilene, Texas. I have known B. Leatherwood over fifteen years and met him first at Ballinger, Texas, about 1898. I happen to know about these horses because I was shipping a car of horses in same train. I accompanied six cars of horses and mules in 1913, the first car was between Raton, N. M. and Winters, Texas, on Santa Fe, Texas & Pacific and Abilene Southern. The second shipment was four cars of mules between Las Vegas New Mexico and Ballinger, Texas over the same roads just mentioned. The sixth car was from Raton to Ballinger over exactly same roads already mentioned. Prior to October, 1913, I would say that I had accompanied a hundred shipments. I cannot recall the exact number of shipments I have made for I have been in the business for at least thirty years. I certainly do remember distinctly accompanying this shipment of horses in October, 1913. In November 1913 I accompanied shipment of four cars of mules; one car of mares in December 1913; one car of mares in October 1914; one car of mares in November, 1914. In November 1913 the four cars of mules were shipped from Las Vegas, N. M. to Ballinger, Texas and the car of mares in December 1913 was shipped from Raton;

273 N. M. to Ballinger over the roads I have already named. In October 1914 the car of mares was shipped from Colfax, N. M. to Ballinger, Texas over the El Paso & S. W. To Tucumcari, N. M. from there to Amarillo, Texas over the Rock Island and from there to Ballinger over the Santa Fe. The car of mares in November 1914 was from Las Vegas, N. M. to Ballinger Texas over the Santa Fe all the way. I made no written record of the shipment of horses in question. I did not go as far as Fort Worth so don't know the condition of the horses when they reached either there or Waco. You ask me to state where the rough handling of this shipment occurred if there was any such. The horses were handled reasonably well up to Abilene, Texas. The mare got her foot out of the car between El Paso and Big Spring in the day time. I was in the caboose at the time this happened and the brakeman come and told us about it. I was not present when the horses were unloaded at Waco so can't tell you who was present when they were unloaded there. I have never been employed by plaintiff.

Mr. Thompson: Defendant offers in evidence plaintiff's original petition filed in this case on March 2nd, 1915 for the purpose of showing that the original suit was brought upon an express contract. (See transcript.)

Mr. Thompson: Defendant offers in evidence plaintiff's first amended petition filed herein December 18th, 1915 for the purpose of showing that the amended petition seeks to recover against defendants by a cause of action arising from an implied contract, the same being a different cause of action from the one originally sued upon; said proof being introduced for the purpose of proving defendants' allegations that the suit is now barred by two years' statute of limitation, the implied contract being plead for the first time on December 18th, 1915.

G. P. BUTT witness for defendants, after being duly sworn, testified as follows:

Examined in chief by Mr. Thompson:

My name is G. P. Butt. I live at El Paso and am thirty five years old. I was born at Longview, Gregg County, Texas. In the month of October, 1913, I was employed by the T. & P. Railroad as freight conductor. I had something to do with the handling of the horses shipped by B. Leatherwood from Watrous, N. M. to Waco, Texas, between October 12th and 15th, 1913. My connection with the shipment commenced at El Paso on October 12th, 1913 at 2:20 A. M. at which time we left El Paso. I checked the shipment at Toyah 194 miles from El Paso, where we arrived at one P. M. October 12th, 1913. This run took us ten hours and forty minutes. I know the usual and customary time for making this trip in October 1913 with trains such as mine. It was twelve hours or more. I made the trip between the two places in better than the usual and customary time. I have been running between El Paso and Big Spring about six years. During that time I have had but one occasion to saw the boards off a

car in order to release an animal in the car, that I remember of.

275 That was at a station known as Gozar eleven miles west of Toyah. There were some other parties present when I sawed the planks to release the leg of the animal but I don't know their names, except the two brakemen, whose names I remember. I remember the circumstances surrounding that incident. That was a meeting point for trains and I was on the sidetrack. The other train had arrived and I was ready to go when one of the brakemen came back to the caboose and told me that a horse had got his foot through the car. I went and looked at it with the brakemen and the stock men. I remember the stock man in charge was in the caboose and another one of the stock men had been out to look at his stock. I went to the head end of the train where I found the horse in this condition. The brakeman went to the caboose and got a small saw and we sawed the plank out to release the horse's foot. I have an independent recollection of the incident, which is just as plain to my mind as anything I remember that happened yesterday. From my records that was two years ago and it has been two years since it was brought to my attention. You ask me to state how I found the horse's leg caught in that car, how far it was from the bottom of the car and what I did with reference to releasing it. You understand this was a slatted or stock car and I could not stand on the ground and reach the foot. The track was on a grade there, not on a dump, but on a grade between the passing track and main line. I could not stand on the ground and work with the horse's foot, but had to get up on the side of the car. It was something like three feet above the bottom of the car where the horse's foot was through the slat. When we first went up there we did not have the saw with us and tried to put the horse's foot back through but there was not the necessary opening to do so. There was not any hole other than is required in a stock car and the animal's foot had been forced through there and we could not force it back in the condition it was in, so it was necessary to saw out the plank in order to get the animal's foot back in the car. The animal was lying down with its foot up in the air like that (indicating). As I remember it was the left hind foot. The car was going east and it was on the north side of the west end of the car. I made an examination at the time and found the horse's foot was forced through the opening between the slats of the car. These slats or planks are nailed on horizontally on the side of the car. At the bottom is a plank about ten inches wide about an inch or two above what is known as the deck of the car to allow for drainage of any moisture that may be in the car. Then above that about one by six is the standard until it gets about four feet high. These one by six are, as I remember, about two inches apart until you get about four feet from the deck of the car and above that they are three or four inches apart. This horse had jammed its foot through one of the narrow spaces between the slats, about, I should judge, three feet from the bottom of the car. I don't know whether two inches would be the exact measurement there as I never measured it. It may vary from that as different cars have different

standards. That foot could not have been put through there without being forced and it could not be forced back on account of the position the animal was lying. I have not any report of this incident on my train book but have a personal recollection of it. You ask if there is any reason why I have not got it on my train book. My answer is since I have got in this case, I must say it was an oversight
277 on my part. My train book was made up by me at that time, October 12th, 1913. It is made up en route and the notations down there concerning the different cars are as I found them. I gave a deposition in this case and stated I had no personal recollection of the handling of this shipment and did not have in my mind at that time the fact of this animal having its foot through there until after it was called to my attention. I had it confused with another shipment of stock. You ask me to point out to the jury the car in which this shipment was moved. It was A. T. 57289. There were twenty two cars in the train and this car was the second car from the engine when we left El Paso, but we set out a water car that was next to the engine and then it became the first car behind the engine. You ask me to state from my experience the ease with which a car rides with reference to its position next to the engine or further back. My answer is that our instructions are to handle stock cars next to the head end of the train to avoid the natural jarring and jerking that would result if they were on the hind end of the train. There is more jerking and jarring in the rear of the train than the front. This is due to slackage in the train. There is so much slack in each car. When I gave my deposition in this case I looked through the pages of my train book until I came to that car, No. 57289 and I found a X mark which referred me to this notation, (indicating) which shows two cripples when loaded at 859, which is the El Paso station number, and received from connection in bad condition. Since I have gone through the book I find that this notation might refer to the car right
278 next to this one, car No. 55310 but I have not got the X mark there for it. When I gave my deposition I thought this X mark referred to this 57289, but I now say the X mark may refer to the other car.

There were no delays on this trip I made from El Paso to Toyah. There was no rough handling and was no unnecessary switching, jerking or bumping between these two points. There was not but one switch made and that is when the water car ahead of the stock car was set out. Then it was not necessary to switch this stock car as we cut out the car ahead of it and then come back and coupled on this one. When we make an inspection of live stock we do it by walking along by side of the car and see whether the stock is up or not. That way it is impossible for the conductor to see whether the animals have minor bruises on them or not. In my deposition I stated this stock was in good condition when delivered at Toyah. This animal that had its foot caught got back on its feet and it appeared its hurt did not amount to anything, so did not figure on its being hurt to amount to anything. If it had appeared to me the animal had a broken leg or was injured seriously I would have made

a notation of it either then or later on. You state this A. T. 57289 is a Santa Fe forty foot stock car and ask if I have handled these Santa Fe forty foot cars. My answer is that I have handled them but *done* know whether this was a forty foot car or not, but my recollection is it is of the series of forty foot Santa Fe stock cars. It has been my experience that these forty foot cars have been used for several years and are considered the best built and equipped stock cars in use. Gozar is only eleven miles from Toyah and it is down hill to Toyah. My experience is that I had closed up my reports.

279 We wash up and watch the train at the same time going down hill, and then we make the inspection of the stock when we get to Toyah. I arrived at Toyah on this trip at one P. M. October 12th, 1913, and my connection with the shipment ceased.

Cross-examination.

By Mr. Templeton:

I have a record of the date my deposition was taken—it was August 31st, 1915. I remember the officer taking the deposition. It was Mr. W. C. Denton. He lives at El Paso and I reckon he is an attorney but am not sure. My deposition was taken by a representative of the T. & P. about a year and ten months after the occurrence. From memory I believe the number of the cars in the train at the time we had this trouble with the horse's foot was twenty one and two of them were loaded with horses. There was no other stock in the train. The deposition asked me about the Leatherwood shipment and if I had a record of the car. I am testifying to it now, A. T. 57289. You ask me if, when that question was asked me if I was not testifying then to the same car as now, A. T. 57289. When that question was asked me I had my train book and looked in the book to check up that car and in that deposition testified to notation in train book relative to a shipment of stock. My deposition shows which car I was testifying about—I have a record of it here. I thought at that time I was giving a deposition with reference to A. T. 57289 and that was the only car I had in mind at the time. That is the same car I am now referring to. I looked at the same car as it appears in my list there and the same relative position in the train I am now
280 looking at, and at that time that was the only thing I had to identify it, but is not the only thing I have to identify it now, as I have had the fact of the horse having its foot through the car brought to my recollection. I have no record of it, but now that it has been brought to my mind, I remember it as plain as can be. It is my duty to make notations of accidents to animals when transporting them, if it amounts to anything, but my book does not show a record of this accident and I have no record of it except in my memory. You ask if, when I gave my deposition, I remembered that circumstance at all and my answer is that I did not think of it and it never entered my mind it was the circumstance at all. It was called to my mind by hearing the testimony here and by talking to the attorney here about the horse

having its foot through the car and I saw the allegations of the plaintiff. That was yesterday morning, I believe, when I went over the matter with Mr. Thompson and that was the first time my attention was called to the circumstance of the horse having its foot through the car. You ask me how I know that circumstance related to this car and did not relate to some other, and my answer is that I never had but one case where a horse had his foot through the car and it was necessary to saw him out. You ask me if, in giving my deposition, I did not say that I did not have any personal recollection of the shipment and depended wholly upon my records and my answer is that all I remembered of it at that time was what my records show and I never remembered differently until I saw the allegations of the plaintiff in the case and connected the circumstance. You ask me if I was not asked in the deposition, you have no personal recollection as to the inspection I made of these horses,

when I made same, how they looked and their condition, 281 except what my record showed and if my answer was that I did not have any recollection as to their looks. That would

have been my answer but now I have a recollection since the fact of the horse having his foot through the car was called to my attention. You ask how I know it is not some other shipment and my answer is, as I told you, that I did not have to cut out but one since I have been on the job. You ask me how I do not know but what some other conductor on the road had an accident like this happen and my answer is probably they did have, but they run their train and I run mine. You ask if I have anything at all to connect that transaction with this shipment except the fact that these witnesses testified that the animal got its foot through a hole in the car; my answer is I have got this much recollection, I can tell you the maneuvers gone through to get the animal out of the hole in the car, where the men were and where I was when it was called to my attention. I can tell you what brakeman come to me and notified me about it and even what brakeman went after the saw. It is a fact I was asked to describe the horse in the deposition and I said I could not do it, as I only knew what my records showed, but do you realize the fact that probably in my time I have handled two or three thousand car loads of horses? You ask me if it is not impossible for a man to remember handling horses and stock along that way and what occurred with reference to any particular shipment after one or two years except by referring to records and I answer no sir and so you ask why I did not remember it then and do remember it now and answer when my attention was called to the fact this was the horse that had his foot through

the car, I remembered it. Brakemen Woodward and Shaw 282 were present and an old man and a young man in charge of the stock, and if I remember correctly my engineer was with me.

You ask which one of the men was in charge of this particular car. My answer is that I remember the old man making the remark that it was not his. I can't tell you what the young man said about it. As I remember it, this was a good sized animal, and from what I saw of it, a pretty good looking animal. It was either a bay or

sorrel, I would not say which. It was not a gray mare. She was lying down when I first saw her, on her side and kind of on her back. The animal was lying in the car headed south, which would throw her on the right side with her head lying east on her right side with her left hind foot up in the crack of the car, with her back toward and close to the west end of the car. We sawed out either one slat, or part of one, as I remember. The foot was not torn to amount to anything at all and I do not remember that there was any bleeding there. She could not have been down more than thirty five minutes, as the train was inspected not less than thirty five minutes run west of there at Levison tank. I can't tell, except by memory, how high her foot was from the floor of the car and cannot tell, except from memory, the size of the crack between the slats, as I have not got the measurements. I don't believe it was four inches, but it was large enough for a full grown animal's foot to go through in a certain position or certain angle, but with the horse lying down with every muscle contracted and every tendon strained you could not get it back, as it would take too much strength to bend it to get it back. These horses were in a stock car. I made a notation in the train book of two horses down when delivered to us by the Santa Fe, but my
283 train now leads me to believe there was a confusion in the shipment of horses and that I made a mistake.

Redirect examination.

By Mr. Thompson:

When I answered Mr. Templeton's question that the crack was large enough for the horse's foot to slip through, I meant that it was large enough with the force the horse put behind it to get the foot through the crack, but it would have to be in a certain position at that and would have to be forced through.

Recross-examination.

By Mr. Templeton:

The horse's foot was through the crack. You ask me if horses will not kick when cooped up and my answer is, yes sir, I have seen them kick the sides out of a car.

Mr. Thompson: We introduce the two pages referred to of witness' train book in evidence, as follows:

"The Texas & Pacific Railway Company.

Conductor's report of train No. Ex. & Ex, left 859 at 2:20 A. M. 10/12/1913, Engine No. 380, Engineer Shubert, Conductor Geo. P. Butt, Bound E, over R. G. Division. Arrived 655 at 1:00 P. M. 10/12/1913.

Initials A. T. & S. F. 57289 (x) Horses to Waco, Texas,
55310 (x) Horses to Winters, Texas.

(x) 2 crippled when loaded at 859, received from conn. line in bad condition.

284 W. S. CANTRELL, witness for defendants, after being duly sworn, testified as follows:

Examined in chief by Mr. Thompson:

My name is W. S. Cantrell. I am employed by the Texas & Pacific Ry. at Fort Worth and have been about ten years and have been chief clerk in local office for about three years. I was familiar with the facilities of the T. & P. at Fort Worth in 1913 for feeding and watering stock and resting them. That was within my jurisdiction. These facilities consisted of the T. & P. stock pens located at the corner of Railroad and Boaz Streets, about a quarter of a mile east of where the conductor in charge of incoming trains turns them over to the yard crew. These pens had water in them and feed could be procured for stock placed in them, as it was right there on the yards. The T. & P. depot is about one hundred to one hundred and fifty feet from the tracks on which trains coming from El Paso stop. In 1913, if a man made a request to have his stock unloaded for feed, water and rest, the same facilities were available as at present. You ask me if people come in there and made such requests and my answer is all of them were subject to our orders, and as chief clerk I had charge of such matters
285 as that. If a man come in there and asked to have his stock unloaded, fed and watered, I had authority to issue the order to have them taken to the T. & P. stock pens and would have done so if such an order had been requested. It is in the line of my duties.

Cross-examination.

By Mr. Templeton:

I do not remember anything about this particular train, as I do not know what the shipment is. I am on duty from eight to six o'clock in the day time. If the stock got in in the night there would be another man there. I was on duty the 14th of October, 1913, if it was not Sunday. I don't know what day that was. I don't know whether I was on duty when the train that brought this stock from the west reached here as I don't know what shipment you refer to. C. H. Woodyard is night chief clerk and was on duty night times. I don't know why this stock was not unloaded. I don't know the exact distance from Big Spring to Fort Worth, but it is about 267 miles and it is 80 to 88 miles, something like that, Fort Worth to Waco, which would make about 350 miles from Big Spring to Waco. I believe a freight train carrying stock usually makes sixteen to eighteen miles an hour. You ask whether a freight

train carrying stock should make the run from Big Spring to Waco, without any unusual delay, in about twenty four hours and my answer is I don't know.

286 J. S. Moss, witness for defendant, after being duly sworn, testified as follows:

Examined in chief by Mr. Thompson:

My name is J. S. Moss. I was in 1913 and am at present a freight conductor for the Texas & Pacific Railway Co. I was born in Milam County, Texas, near Rockdale. In 1913 I was running on the Rio Grande division of the T. & P. out of Big Springs. I had something to do with the handling of a shipment of horses in A. T. 57289 in October 1913. I have here my record which I made at the time and it is in my handwriting. It shows I handled A. T. 57289 out of Toyah to Big Springs on October 12th, 1913. I took charge of it at the time I left Toyah, which was 2:00 P. M. October 12th, 1913, and arrived at Big Springs at 10:15 P. M. same date. It is 153 miles from Toyah to Big Springs. The average run between these points is from eight to ten hours. On this occasion it took us eight hours and fifteen minutes to make the run, and it was a good average run between the two places. My record shows this car A. T. 57289 was the head car of the train leaving Toyah, or the one next to the engine. We picked up eleven cars of cattle at Odessa which naturally would be put right back of the engine, so this car of horses would have been the twelfth car from the engine arriving at Big Springs. Odessa is sixty miles from Big Springs, so this car of horses traveled ninety three miles the first car behind the engine and sixty miles the twelfth car from the engine, according to my records. From my experience I would say that the nearer a car is to the head end of a train the less shock it receives from ordinary handling, such as starting, stopping, etc. It is not possible to make

287 all the cars first in the train unless you run one car trains.

On this trip from Toyah to Big Springs there was no unnecessary switching, jerking or bumping or unnecessary delays. In fact there was no switching at all of this car, and no unnecessary rough handling, as you might call it, such as jerking and bumping of the cars. There was nothing done at all except to pick up these eleven cars of cattle at Odessa. They were picked up by the engine and backed up and coupled on the train. I made an inspection of the horses in this car at Toyah when I checked up the train. The inspection I give a shipment of live stock would not be as minute as a live stock inspector would give. In checking up a train I take the initials and numbers of the cars and always look in the cars to see that the stock are on their feet. Of course there might be some blemishes or damage to the stock I would not see in that inspection. I hardly could have any personal recollection of this shipment that far back as I handle so much stock. You ask if I remember handling a car in which a piece was sawed out of the side and I answer yes, I handled a shipment of stock where one of the horses had got his foot out through a crack and a little piece of board was

sawed off so he could get out. That was along a couple of years ago and I know in my own mind this was the shipment, but I can't testify positively it is because I am testifying from records and I did not make any record of that. The car I have in mind had a piece sawed out of the north side of the car, which would be the left hand side going east and it seems to me it was about two or three feet from the bottom of the car. I did not make any record of it and I did not pay any attention to it, except just notice it. I have sawed
288 lots of them out that way and I knew what had happened when I saw it. I knew that some animal had got his foot caught through there and the board had to be sawed to get it out. My experience has been that animals will be lying down and in scrambling to get up will kick a foot through the crack. The horse is lying down and the other animals are trampling over it, in trying to get up they kick with more or less force and when they get their foot in a crack can hardly get it out. It requires some force for a horse to get his foot through one of these cracks but when the hoof is straight out and the toe pointed toward the crack you can force it through that way, while they could not if the foot was flat against it. This is the usual way of getting a foot hung in a crack of the cars, as I have noticed, from my observation.

Cross-examination.

By Mr. Templeton:

I cannot remember anything particular about this shipment but am relying on my records. In giving my deposition I do not think I testified to this run from Toyah to Big Springs but was asked about the run on the other end of the division. I made the run from Toyah to Big Springs in eight hours and fifteen minutes. This is 153 miles which would make the run between eighteen and nineteen miles an hour, including stops and everything. The fact of this car having a piece of the slat sawed out come to my mind after I had heard about it, but I had it in my mind all the time, otherwise I would not have known it was the same shipment, as I did not
289 have any record of it. In my judgment this hole was somewhere between two and three feet above the floor of the car, about the distance a horse lying down and struggling to get up would kick. I don't know the width of these cracks but they are something like three or four inches. That is about the average of them, but I never measured one in my life. I have frequently sawed horses out. It is not uncommon at all for a horse to get its foot through a crack that way, and then you have to saw a little on each side of the foot and split the piece out to let the foot out. The reasons cracks are left that way are for ventilation and so the attendants see the animals and punch them up if they get down. The attendants going along with the stock have a prod pole to get the animals up when they get down. I do not attempt to inspect each animal. You ask if it is not a fact when there are attendants along with stock that we do not pay any attention to them except at the end of the run. My answer is that we always look them over when we go down the side of the

train to see if any are down and if there are none down we don't pay any further attention to them. I don't remember how many cars there were in that train, but my record shows exactly. It had twenty seven including the caboose out of Toyah. We had five empties on the rear end, sixteen cars of what is called time freight, including two cars of perishables, one of potatoes and one of tomatoes, three cars of lumber and two cars of horses. The lumber was right behind the horses. The train had air brakes. It is the theory and practically true that when the air is applied it sets all the brakes at once. That is, it commences at the engine and goes back setting the brakes on all the cars at almost the same
290 time. The brakes are held off the wheel by the air until it is applied by the engineer's brake valve. This is done to avoid slackage. It is 127 miles from Big Springs to Baird and we made the run there in seven hours and thirty minutes, leaving at 9:45 P. M. and arriving at 5:15 A. M. This would be about eighteen miles an hour including stops. Baird is 140 miles from Fort Worth, but I did not handle the stock east of Baird. I don't know whether it was unloaded at Baird or not, but don't think it was.

Redirect examination.

By Mr. Thompson:

I left Big Springs with this stock October 13th, 1913, at 9:45 P. M. The horses stayed in Big Springs from 10:15 one night until 9:45 the next night. We arrived at Baird at 5:15 A. M. October 14th, 1913. The run of seven hours and thirty minutes from Big Springs to Baird was a good run and within the usual and customary time. There was not any switching at all between Big Springs and Baird and no unnecessary delay or bumping of the cars between these points. When we left Big Springs this car of horses was the fourth car from the engine and practically remained in this position during the entire trip, as it arrived in Baird the fourth car from the engine. I had better explain what I mean by that. When we left Big Springs this was the fourth car from the engine, or, in other words, the head through car. I had a car of horses ahead of it to be set out at Abilene, two cars to be set out at Sweetwater, which three cars would be ahead of the through loads. Then
291 we picked up a car of cattle at Roscoe and picked up two cars of cattle at Sweetwater, so when the car of horses was set out at Abilene this shipment remained the fourth car in the train, as the three cars picked up had been put ahead of it. (Witness here draws diagram showing distances and relative position of various towns named.) Abilene is twenty one miles from Baird. There was no switching with this car at all between Big Springs and Baird, as the car was not cut off the train. It takes about the same time to make the run between Big Springs and Baird as it does the division west of it, although it is about twenty five or six miles shorter, because there are more hills. That is my signature on the condition report signed by Fred Crowder and I wrote the report. He was the shipper in charge of the horses and the report shows they were in good con-

dition when he signed it. You ask if I told Mr. Crowder to go ahead and sign this report although the horses were injured, just because I wanted to show a clear report and my answer is no sir, I never made that remark, I absolutely did not tell him that. I requested him to sign the report, but did not make a request of the nature you mention. We do not use any compulsion toward shippers to get them to sign these reports, but they sign them of their own free will. I never use any persuasion whatever to make them sign and I did not try to have Mr. Crowder sign the report showing false facts in order to make my record clear.

292 Recross-examination.

By Mr. Templeton:

We make out these condition reports and present them to the shippers to be signed and if they do not sign them we ask why, as we are required to give reasons for them not signing. The purpose of the report is to get the condition of the stock as it goes over the division. I do not remember anything that happened between Mr. Crowder and myself. After we reached Baird I walked along the side of the train and looked at the stock and that is the last time I saw it. This car was moved as through freight. Live Stock from El Paso usually goes through in a through train and it was practically all through freight that I handled in this train.

M. H. WILLIAMSON testified by deposition taken by defendants before Wauldine Maxwell, Notary Public in and for Howard County, Texas August 17th, 1915.

By Defendants:

My name is M. H. Williamson. I am forty nine years old and my present occupation is that of stock loader for the Texas & Pacific Ry. and followed the same occupation in 1913. I unloaded the horses in A. T. 57289 at Big Spring, Texas at 10:30 P. M. October 12th, 1913 and fed and watered them and reloaded them at 9:00 P. M. October 13th, 1913. All I had to do with this shipment was to unload, feed and water them and reload. I examined the horses in this car and they were in good condition when I first saw them and in good condition when I last saw them. My connection
293 with this shipment commenced when I unloaded them 10:30 P. M. October 12th, 1913 and ceased at 9 o'clock P. M. October 13th, 1914. My testimony has been principally from records, which were made at the time I handled this shipment. They are in my own handwriting and were made at the time I examined the horses and are correct. I cannot attach the original records because they are in my book but I have made a true copy and had the notary mark it Exhibit A and attach same.

Answers to Cross-interrogatories Propounded by Plaintiff.

I never had charge of the train containing this car of horses, but only handled them while in and at the pens at Big Spring, Texas.

My duties are to load and unload cattle of the Texas & Pacific Ry. Co. and to feed and take care of stock while in the Big Spring pens. I had nothing to do with this train and never handled any train for the Texas & Pacific Ry. Co. I have stated I am testifying from my records. I have no personal recollection as to the inspection of this shipment, except that I always inspect stock when I unload them and if they have been damaged in any manner I made a note of it on my records. I have no personal recollection as to the kind of horses contained in this shipment but if any one of them had been damaged I would have had a full description of them on my records. I only inspected the horses for the purpose of seeing if any of them were damaged but did not inspect as to the color of feet or kind of horses. I don't know anything about the stops the train made. I have asked the notary if he is an employe of either of the defendants and he says he is not nor has ever been. I never made
294 a report to the Company as to this shipment.

Exhibit A referred to in foregoing deposition is as follows:

Form 1188.

The Texas & Pacific Railway Co.

Record of Car Seals.

Train No. —. 10-12-1913. Unloaded 10:30 P. M.

A. T. & S. F. 57289, 30 horses. Fed and watered, reloaded 9 P. M. 10-13, All O. K.

M. H. WILLIAMSON.

W. S. SMILEY testified by deposition taken at instance of Texas & Pacific Ry. Co. by Carl W. Wade, notary public in and for Tarrant County, Texas on August 16th, 1915.

By Defendant:

My name is W. S. Smiley, my age is forty four years and my occupation now and in October 1913 was that of freight conductor for the Texas & Pacific Ry. Co. I handled car A. T. S. F. 57289 containing horses from Baird, Texas to Fort Worth Texas, October 14th, 1913 as conductor. My connection with this shipment began at Baird, Texas at 6:30 A. M. October 14th, 1913. The distance from Baird to Fort Worth, between which two places I handled this shipment is one hundred and forty miles. I had charge of this shipment between these points for nine hours and ten minutes. I know the usual time required to handle a shipment of horses between the two points mentioned and it would be between eight and
nine hours.

295 I can give the time approximately required to handle a shipment of horses by the Texas & Pacific in October, 1913 between El Paso and Fort Worth. It would take from thirty six

to forty hours. I never worked for the M. K. & T. of Texas so can't say what time would be required to handle a shipment of horses from Fort Worth to Waco. I gave these horses careful handling while they were in my charge. There was no rough handling, bumping or jerking or any unnecessary switching of the car containing these horses, while in my charge, and there were no unnecessary delays. By unnecessary delays I mean such delays as are out of the usual stops or delays necessarily incident to a freight run between these two points inquired about. There were no such delays on the run in question bringing the horses from Baird to Fort Worth. This car of horses was carried in the usual and customary time while in my charge from Baird to Fort Worth and were also carried in the usual and customary manner. I examined these horses both at Baird when my connection with them began and also at Fort Worth when my connection with them ceased and in addition to that, several times between Baird and Fort Worth. I found the horses in good condition on each occasion that I examined them. I made a careful examination each time I examined these horses. I have been testifying from my records. These records were made by myself at the time of the transactions to which they relate. They are in my own handwriting and represent the true condition of the shipment at the time I handled it. I cannot attach the originals because they are no longer mine, but am attaching a true copy made by me and marked Exhibit A for identification.

296 Answers to Cross-interrogatories Propounded by Plaintiff.

I began to accompany this train as conductor at Baird, Texas, where I received it from the Texas & Pacific Company's yard master and turned it over to the same Company's yard master at Fort Worth. As stated I took charge of this train at 6:30 A. M. October 14th, 1913 and turned it over at 3:40 P. M. same date. My duties consist of being responsible for the movement of the train of which I have charge as conductor. When I took charge of this train at Baird I did everything that was necessary in the movement of the train from Baird to Fort Worth, looked after the condition of the live stock shipments frequently along the run, and made a record of everything connected with the run that it was necessary to record. I can't say how many trains of live stock I have handled since that time. I have no personal recollection of this trip and outside of my records do not remember what I saw or what happened to the train on that trip. I cannot describe the looks of these horses. I know nothing about their faces, as I do not make a record of the color of horses' faces that are carried in shipments over which I have charge as conductor. That is not in the line of my duties as conductor of a freight train. I know no more about the color of the horse's feet than their faces. I don't know how many black horses there were in the bunch and do not remember about a gray horse being with them. I made no record as to the weight of the horses. I have no record of one or two minute stops I made on this run and

I make no records of passing trains unless the delay is a real delay out of the usual course of the run. All the necessary stops we had on this run were for meeting trains. If there had been any others I would have recorded them. These stops were necessary to get the horses to their destination as the trains had to be met and passed, and they were not caused by plaintiff or his agents that I know of. The notary informs me that he is not now and never has been in the employ of the defendants, or either of them, at any time. I made a stock report as required in case of every stock shipment, to the T. & P. Ry Co.'s Division Superintendent, but this report is made from the records from which I am testifying, I have not got that report, it is not mine and I have already attached a copy of my original records to this deposition.

Exhibit A referred to in foregoing deposition is as follows:

Conductor's report of train No. extra, left 386 6:30 A. M. Oct. 14th, 1913, arrived at 246 at 3:40 P. M. 10/14-1913. Engine No. 371, Engineer W. L. Simpson, Fireman J. Stewart, conductor W. S. Smiley, brakemen H. F. Walker, J. M. Jay, call for 6:45 A. M.

Initial T. & P. No. 57289, Gross 35 wt. of car — where taken 386, left 247. Horses billed to 246 c/o Katy reloaded at 513 9:00 P. M. 10/13/13. Man in charge.

Mr. Thompson: We introduce in evidence for the purpose of sustaining defendants' plea in the alternative, set out in paragraphs ten and eleven of its answer, and also in pursuance of agreement will state that contracts were issued at El Paso for the Texas & Pacific, signed by Fred Crowder as agent of B. Leatherwood, covering shipment El Paso to Fort Worth; and at Fort Worth contract was executed by the M. K. & T. of Texas signed by Fred Crowder as agent of B. Leatherwood covering the shipment Fort Worth to Waco. We introduce paragraph four of the Texas & Pacific Contract with reference to the duty of the shipper's agent to unload, feed, water and rest said stock, as follows:

"Fourth. That said shipper at his own risk and expense is to take care of, feed, water and attend to said stock while the same may be in the stock yards of the carrier, or elsewhere, awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload and reload same at feeding and transfer points and wherever the same may be unloaded and reloaded for any purpose whatever, and hereby covenants and agrees to hold said carrier harmless on account of any loss or damage to his stock while being so in his charge, and so cared for and attended to by him or his agents or employes as aforesaid, except such damages as may result from the negligence of the carrier."

We also introduce paragraph two of the M. K. & T. of Texas contract, to the same effect.

"The shipper shall load, unload and reload said cars and see that the same are securely fastened and shall feed and water said live

stock and attend to them while in carrier's stock yards, pens or said cars at his own cost and expense, but the carrier agrees to allow said shipper free use of its pens and chutes. The shipper shall leave said pens and chutes in like condition which he finds them."

290 CHARLES NANCE testified by deposition taken at instance of Texas & Pacific Ry. by Carl W. Wade, notary public in and for Tarrant County, Texas, on August 20th, 1915, as follows:

By Defendants:

My name is Charles Nance, my residence Fort Worth, Tarrant County, Texas, my age twenty seven and I am yard clerk for the Texas & Pacific Ry. Co. at their North Yards in Fort Worth. In October 1913, my occupation was the same as mentioned above. As Yard Clerk for the Texas & Pacific Ry. I had something to do with the shipment of horses in A. T. — S. F. 57289 on October 14th, 1913 as to the delivery of the car to the M. K. & T. Ry. at Fort Worth. My connection with this shipment began at the time this shipment was received from the Texas & Pacific Ry. Co. to the M. K. & T. Ry. Co. at five ten P. M. October 14th, 1913, and ceased at the same time. My connection lasted only during the delivery which was a matter of a few minutes. I made an examination of the horses during my connection with them and found them in good condition on delivery to the M. K. & T. There was a man in charge of the shipment and he claimed to me that he had had the best of service in the shipment of these horses so far. I have testified from my records as to the time of delivery of this shipment of horses to the M. K. & T. Ry., as to their condition at the time of such delivery, as to what the man in charge said as to the kind of service he had had. I have testified as to other facts from memory. The records I am
300 testifying from were made by me at the time of the delivery and inspection of these horses. They are in my own handwriting and are a true and correct statement of the facts to which they relate. I cannot attach my original record as it has been turned over to the railroad company but attach a true and correct copy and mark it Exhibit A.

Answers to Cross-interrogatories Propounded by Plaintiff.

All I had to do with this shipment was to turn it over from the Texas & Pacific to M. K. & T. Ry. Co. and my entire connection was at that time. I made no run with the shipment. My duties are to receive shipments from and to connections, note time of turning over shipments at the North Yard connections, and note conditions of shipments after examinations made upon turning over shipments. I made no trip with this train containing this shipment but merely noted time of turning shipment over to the M. K. & T. and condition of horses at the time. I have no idea of how many live stock shipments I have handled since I handled this one. I have no personal recollection of my inspection of these horses. You ask if I have a personal recollection of the looks of these horses and to describe their

looks and different classes of animals in the shipment. My duties do not require me to ascertain the things inquired about when making an examination of live stock to see what their condition is, unless some particular animal is injured or in bad condition and in such case I would make a description of the animal. It is not in the line of my duties to note colors of feet or faces of horses in shipments. I inspected these horses close enough to observe their condition, but my inspection was only for the purpose of noting their condition, and not their color and different classes of animals except when their condition is not O. K. As I have already stated I did
301 not accompany this shipment on any run. The notary advises me he is not and never has been in the employ of either of the defendants. I made a report of my handling and condition of this shipment and it is the record from which I am testifying in this case. This record was turned over to the car accountant as soon as made but I am attaching a copy of same to this deposition as requested in direct interrogatories.

Exhibit A referred to in foregoing deposition is as follows:

Texas & Pacific Railway Company. Form 1188. From or to road or train, T. & P. to M. K. & T. In — out 5:10 P. M. 10/14/1913.

Initials A. T. Number 57289, seals L. S. 8-246—right—8-246—left, horses Waco Tx., loaded 7 A. M. 10-14, Stock in good shape, man in charge claims good service. Nance.

S. E. CHASE testified by deposition taken at instance of M. K. & T. Ry. by O. M. Weatherby notary public in and for McLennan County, Texas on August 30th, 1915.

By Defendants:

My name is S. E. Chase, my age thirty nine and I am a freight railway conductor. During the month of October, 1913, I was employed by the Missouri, Kansas & Texas Ry. Co. of Texas as freight conductor. I handled the shipment of horses contained in A. T. S. F. 57289 October 14th and 15th, 1913, as freight conductor for the M. K. & T. Ry. of Texas. I received the shipment at
302 Fort Worth at 10:55 P. M. October 14th, 1913, and delivered it at Bellmead at 10:00 A. M. October 15th, 1913, at which time my connection with the shipment ceased. The distance I handled this shipment between Fort Worth and Bellmead is 84 miles and it required ten hours and fifty five minutes to handle the shipment that distance. I know the usual and customary time to handle a shipment of the kind this was between Fort Worth and Bellmead. It is six to seven hours. It took longer on this trip on account of the necessity of unloading some cars at Itasca, Texas and because of necessary delays. I do not know the usual and customary time required by the T. & P. to handle a car of horses from El Paso to Fort Worth in October, 1913. This shipment of horses was handled carefully and there was no rough handling of any kind while it was in my charge. There was no unnecessary switching, bumping or jerk-

ing and no rough handling of any kind more than is incident and necessary in handling such shipments by freight. The delays between Fort Worth and Bellmead were necessary and in accordance with my orders. By unnecessary delays, I mean such as I could reasonably have avoided in handling this shipment in accordance with the rules, regulations and instructions of the Company. There were no such delays while the shipment was being handled by me. This car of horses was not carried in the usual and customary time for several reasons. In the first place it was a very bad night, raining hard, and an hour and thirty minutes' time was consumed in unloading the cars of stock at Itasca. We were delayed an hour and fifty five minutes at south yards meeting passenger trains and other trains and in picking up and setting out some cars. I made
303 an examination of these horses at the time they came into my charge and along the road at different stops but did not make an examination of them at Bellmead. They were in good condition each time I examined them. I have testified from my records and also from my memory, as I remember the handling of this shipment very clearly and distinctly. I have examined the Company's records which were made at the time of the handling of this shipment and they represent the true condition of the shipment at the time it was handled. I also made records at the time of the handling of the shipment. My train book, which is the record of this shipment made by me, has been stolen and therefore I cannot attach it or a copy of it. The stock report was made by me and turned over to the Company and same is now before me but I have no blank upon which to make a copy of same and am not therefore attaching a copy. The stock record is the only record I have made by me and the Company requires that it be returned for their files.

Answers to Cross-interrogatories Propounded by Plaintiff.

I took charge of this shipment at Fort Worth and turned it over to the yardmaster at Bellmead—received it at 10:55 P. M. October 14th, 1913 and turned it over to yardmaster at 10:00 A. M. October 15th, 1913. My duties as freight conductor are to look after the train over which I have charge and to perform the usual duties of a freight conductor. I cannot describe and name each and every thing that I did on this trip, but I did those things that were necessary to handle the shipment and train in proper manner. I do not know how many live stock trains I have handled since that time but have handled a great many of them. I have a personal
304 recollection about this trip but of course am depending upon my records as to time of receiving and delivering the shipment. I remember these horses but cannot tell you with reference to their condition, as to color, height size and weight or number of the different classes as I did not personally notice that. I do not remember any stallions and can't say how many of them had white feet or if any of them had white faces. I inspected these horses close enough to observe whether they had white feet and white faces, but there was nothing to make me remember this at the time as

I handle so many shipments of this character. Of course I could not now testify how many were mares or how many were geldings. I left Fort Worth at 10:55 P. M. and was delayed twenty five minutes in the yard at Fort Worth setting out a car that was in bad order. I was delayed ten minutes at Alvarado waiting for orders; I was delayed one hour and thirty minutes at Itasca in unloading stock; I was delayed ten minutes at Hillsboro for orders. There were the following delays at south yards; I was blocked by other trains fifteen minutes, switching thirty minutes, delayed one hour and ten minutes meeting No. eight passenger train. I was delayed forty five minutes doubling into Abbott on account of rain and slick track. Was delayed thirty five minutes at Elm Mott to meet passenger train No. two. These were all the stops and delays and same were necessary—I could not avoid them. These delays were not necessary for the benefit or protection of said horses particularly but were necessary in handling a train of this kind and character at the time and under the conditions in which they were

305 handled. They were not caused by plaintiff or plaintiff's agents, but were necessary in the handling of the shipment.

The notary says he is not now nor has ever been in the employ of either of defendants. I made a report of the handling and condition of these horses at the time of the handling of the shipment and delivered it to the yard clerk at Bellmead upon my arrival there. The original is now in the hands of the company among the files covering this shipment. I have not attached a copy of same because I have no blank and there is so much of it that it would necessitate an immense amount of time to make a copy.

JOE RAINEY testified by deposition taken at instance of defendants, by L. R. Patton, notary public in and for Galveston County, Texas, September 3rd, 1915.

By Defendant:

My name is Joe Rainey. I am forty years old and am a book-keeper. About October 15th or 16th, 1913 I was claim clerk for the M. K. & T. Ry. at Waco, Texas. I did not have anything to do with the handling of this shipment, but on the day they arrived in Waco the agent instructed me to go down and make an examination of the horses upon their arrival and unloading at the stock pen. I went down in the afternoon and looked them over. I was instructed to note any apparent recent injuries or damage. I believe they were unloaded at night on arrival. I looked them over for outside bruises and cuts and made the examination as thorough as I could without putting my hands on the horses. According to my recollection my report was correct and there were apparently no fresh injuries to the horses. They had been cut but not recent cuts. The cuts were practically healed. Prior to October 16th, 1913 I had no experience whatever with examination of the condition of the horses in question. If the horses had been injured by having a cut or a broken bone or anything that could be detected by looking at the horses I think I

should have seen it. I noticed no damage to the horses or any of them. I am testifying from memory except am using record of examination made at time of examination in my handwriting for time of the examination. The original record is on file at Waco, Texas, but I attach copy as requested.

Answers to Cross-interrogatories Propounded by Plaintiff.

I did not accompany this train. My duties consisted of handling and adjusting local claims for the Katy at Waco. I did not have anything to do with handling this train or any other since. I don't think I could describe these horses. They were a bony lot of horses and seemed to be under fed, if I remember rightiy. I don't remember how many had white faces or white feet or how many were mares or geldings. I don't know that any of them had white faces or white feet as I was not looking at them to identify them but was looking for injuries. I don't know how many black horses in the bunch, or whether there was a gray horse or how much they would weigh on an average. The notary says he was never employed by the Katy or Texas & Pacific. I made a report of the apparent condition of the horses after they were unloaded in the stock pens at Waco, Texas for the record of the Waco office. This report was
307 made on the day of unloading and I attach a copy of same to this deposition marked Exhibit "C."

Exhibit C referred to in foregoing deposition is as follows:

"10/16. T. & P., El Paso to Waco, T-86.

A. T. & S. F. 57289.

Thirty horses, 2 colts, man in chg. All 29 head in good condition. No fresh scratches on them. None apparently lame."

B. LEATHERWOOD testified further by deposition, parts offered by defendant, as follows:

Offer answer to third cross interrogatory of deposition dated May 1st, 1915, as shown page 35 this statement of facts, as follows: "I bought these horses from different parties and paid different prices for them. I bought some of them from Leigh Hand, some from Murray Carleton, Jr. I paid from \$40.00 to \$80.00 for the horses included in the shipment, but it is impossible for me to specify just which horses were bought at a particular price."

Offer answers to twelfth and thirteenth cross interrogatories from deposition of said witness taken September 3rd, 1915, as follows: "The aggregate amount I sold these horses for at Waco was \$1283.00 and it was about ten days after they arrived at Waco before they were sold."

Defendant rests.

308 Mr. Templeton: We offer in evidence Exhibit "A" to George Butt's deposition taken in this case, as follows:

"The Texas & Pacific Railway Company.

Conductor's report of train No. Ex. & Ex. left 859 at 2:20 A. M. 10-12-1913, Engine No. 380 Engineer Schubert Conductor George P. Butt. Bound E over R. G. division fireman Cleveland, Arrived 655 at 1 P. M. 10-12-1913 Brakeman J. H. Shaw G. C. Woodward. Road initial A. T. & S. F. No. 57289 Kind stock car weight thirty tons from 859 to 665, Horses Waco loaded 1 A. M. 10-12-1913, two crippled when loaded at 859 received from connecting line in bad condition. Delayed at 859 w0 min. for bills no rough handling or delay, man in charge of horses refused to sign 1371."

GEORGE P. BUTT recalled by Mr. Thompson.

At the time I saw this animal with its foot through the crack in the car there was no plank broken nor any hole in the car through which any animal had its leg near the bottom of the car.

Questioned by Mr. Templeton. That No. 1371 is the form number of the stock condition report which Fred Crowder refused to sign.

Mr. Templeton: We offer the following, being the answer of witness George P. Butt to the 17th subdivision of the third cross interrogatory and answer to the fourth cross interrogatory from deposition taken by Texas & Pacific Ry. on August 31st, 1915.

309 "My record shows that these horses had two crippled when loaded at El Paso and they were received from connecting line in bad condition, this information came from shipper in charge of horses and the condition of the two horses verified his statement and they were in the same condition when my connection ceased. I have been testifying from my record."

GEORGE P. BUTT recalled by Mr. Thompson:

When I gave the deposition which has just been read in part I got the information from the train book which I showed the jury this morning. There are two shipments to which the same statement might apply. I got that notation from the X mark from this car and there is another one in front of another car that I did not notice when I gave my deposition. I can't tell now whether this notation refers to this shipment, that is with reference to the two being down and bad condition or has reference to the other or Winters shipment.

All parties close.

310 THE STATE OF TEXAS,
County of Tarrant:

I, F. J. Huntoon, acting official stenographer for the County Court for Civil Cases, of Tarrant County, Texas, hereby certify that the foregoing pages contain a full, true and correct statement of all the material facts adduced in evidence at said trial of said cause, styled and numbered in the caption here, as narrated by me from my short hand notes and documentary evidence taken and introduced on the trial of said cause.

F. J. HUNTOON,
*Acting Official Stenographer County Court
for Civil Cases, Tarrant County, Texas.*

Agreement.

It is hereby agreed by and between attorneys for plaintiff and defendants that the foregoing pages contain a full, true and complete statement of all the material facts adduced in evidence at said trial of said cause, styled and numbered in the caption hereof, and that it is adopted as the narrative statement of facts in said cause, the question and answer statement of facts being waived.

TEMPLETON AND MILAM,
Attorneys for Plaintiff.
THOMPSON & BARWISE
(G. T., JR.),
Attorneys for Defendants.

Approved,

CHARLES T. PREWETT,
Judge County Court, Civil Cases.

311-12 THE STATE OF TEXAS,
County of Tarrant:

I, J. A. Scott, Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas hereby certify that the above and foregoing instrument in writing of eighty pages contain a true and correct copy of the statement of facts now on file in this office in cause No. 8517. Texas & Pacific Railway Company et al. vs. B. Leatherwood, from the County Court of Tarrant County.

Given under my hand and the seal of said court on this the 12th day of July, A. D. 1917.

[Seal Court of Civil Appeals of the State of Texas.]

J. A. SCOTT, *Clerk.*

313 In the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth.

No. 8517.

TEXAS & PACIFIC RAILWAY COMPANY and MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Appellants,

VS.

B. LEATHERWOOD, Appellee.

Appealed from the County Court of Tarrant County, Texas, for Civil Cases.

Appellants' Motion for Rehearing in the Above-numbered and Entitled Cause.

Come now the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, appellants in the above numbered and entitled cause and file this their Motion for Rehearing of this cause and with respect pray this Honorable Court to set aside the judgment of this Court entered herein on February 24th, 1917, affirming this case, and to grant Appellants a rehearing herein and to reverse and render or reverse and remand or reverse and reform this case for the following reasons:

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I.

Appellants' first assignment of error and the proposition thereunder, found on page 5 of its brief on file herein, presented a federal question in that there was involved the construction of a bill of lading issued by the initial carrier at Watrous, New Mexico, covering the through transportation of said shipment to Waco, Texas, the same being an interstate shipment and governed by the laws of the United States with reference to interstate commerce. The said initial contract issued by the initial carrier at Watrous, New Mexico, was the only legal and binding contract that could be issued covering appellee's shipment from Watrous, New Mexico, to Waco, Texas, and appellants having pleaded a provision in said contract and bill of lading to the effect that any suit for loss or damage to the shipment covered by said bill of lading or contract must be filed within six months after said loss or damage occurred or else said suit would be barred, and appellants having introduced in evidence said bill of lading issued by the initial carrier containing said provision, aforesaid, and said bill of lading showing on its face that it was issued and was based upon the lower of two through rates filed with the Interstate Commerce Commission, and the evidence showing that appellee failed to file this suit within six months after the loss or damage occurred, the said provision contained in said bill of

lading with reference to filing suit within six months after loss and damage to appellee's shipment was reasonable as a matter of law, and was an absolute bar to appellee's recovery from appellants notwithstanding the fact that after appellee's shipment was carried from Watrous, New Mexico, to El Paso, Texas, under the through contract and bill of lading issued by said initial carrier, the

315 Santa Fe Lines, at Watrous, New Mexico, the appellants, Texas & Pacific Railway Company, and Missouri, Kansas & Texas Railway Company of Texas, refused to carry said shipment on through to Waco under the original through bill of lading and required appellee's agent to enter into new contracts and sign new bills of lading both at El Paso with the Texas & Pacific Railway Company's agent and at Fort Worth, Texas, with the Missouri, Kansas & Texas Railway Company of Texas's agent, for the reason that said subsequent bills of lading and contracts so executed at El Paso and at Fort Worth by the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas were without consideration and were illegal and void under the Interstate Commerce Act and the appellants, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, would not be estopped from claiming and asserting the provisions contained in the original bill of lading executed at Watrous, New Mexico, by the initial carrier, because of the prevailing legal rule to the effect that a person can never be estopped by an act that is illegal and void.

Therefore the Court of Civil Appeals erred in over-ruling and not sustaining appellants' first assignment of error and the proposition thereunder found in appellants' brief on file herein at page 5 thereof.

Statement.

Appellants' Special Charge No. 1, insofar as this assignment of error is concerned, is as follows:

"GENTLEMEN OF THE JURY: In this case you are instructed to return a verdict in favor of the defendants, Texas & Pacific

316 Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, for the following, or any of the following reasons towit:

"1. Plaintiff failed to file suit for damages arising out of the shipment of horses within the period of six months after the accrual of such damages, as the plaintiff agreed to do in the original contract issued at Watrous, New Mexico, which contract was made and entered into by and between the plaintiff and the Santa Fe lines of railway, and which contract inured to the benefit of these defendants * * *." (Tr. p. 55.)

Appellant's Special Charge No. 1, requesting the court to instruct the jury peremptorily for appellants, was duly presented to the court and to appellee's counsel within a reasonable time prior to the giving of the court's main charge to the jury, and appellants took a bill of

exceptions to the refusal of the court to give such peremptory instruction. The court over-ruled the objections and exceptions of appellants with reference to the action of the court on said Special Charge No. 1. (Tr. p. 172.)

Appellants, in their bill of exceptions to the refusal of the court to give Special Charge No. 1, assigned, among other reasons, the following as to why the same should have been given:

"First. These defendants in their amended answer filed in this cause, pleaded that at the point of origin of said shipment of horses involved herein, towit: Watrous, New Mexico, the plaintiff himself and the initial carrier, the Santa Fe lines, entered into a written contract covering the shipment and carriage of the plaintiff's said horses

317 from Watrous, New Mexico, to Waco, Texas, a point in one state of the United States to a point in another state in the United States, and that said shipment was, therefore governed

and controlled by the laws of the United States regulating interstate commerce, and that one of the provisions in said contract of shipment so executed at Watrous, New Mexico, was a provision which provided that any suit for the recovery of any damage arising out of said shipment should be instituted within six months after the damages accrued. This provision of the contract these defendants pleaded in bar of the plaintiff's right of recovery herein, and the evidence having shown the above facts, and having further shown that the plaintiff failed to bring his suit based upon the damages accruing to said shipment of horses until March 2, 1915, more than six months after the happening of said damages as complained of, which damages, according to the allegations of the plaintiff's petition, occurred in October, 1913, and the said provision of said contract being reasonable, as a matter of law, and being a legal and binding contract covering the shipment of plaintiff's horses from Watrous, New Mexico, to Waco, Texas, notwithstanding the refusal of the subsequent carriers, Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, to handle and transport said horses of the plaintiff under the initial contract and requiring the execution of new contracts upon their respective lines of railroad,

318 these defendants say that the plaintiff should be barred from a recovery in this suit for failing to comply with the provisions in said initial contract which have been properly pleaded and evidence adduced thereon, and for this reason the court should grant the peremptory instruction in favor of these defendants." (Tr. p. 167 fourth line from bottom, to p. 169, line 8.)

Said bill of exception shows that after appellants had presented to the court the above reason why Special Charge No. 1 should be given to the jury, and after the court had over-ruled same, appellants took their Bill of Exception No. 8 to the action of the Court. (Tr. p. 172.)

Appellee, in his First Amended Original Petition upon which he went to trial, pleaded as follows:

"For cause of action plaintiff pleads the following facts, towit:

On, towit, the 9th day of October, 1913, plaintiff delivered to the defendants Santa Fe Companies, at Watrous, New Mexico, for trans-

portation over said lines of railway to Waco, Texas, a car load of horses consisting of thirty-two head of mares, geldings, etc., which stock said defendants then and there accepted for shipment to their destination." (Tr. p. 12, lines 3 to 12.)

Appellants, in their First Amended Original Answer upon which they went to trial, pleaded as follows:

"For further and special answer herein, if so required, these defendants say that the shipment of horses involved in this suit, and on account of which damages are sought to be recovered, was an interstate shipment, and as such was and is subject to the laws of the

United States governing interstate commerce, in that said
319 horses, as is disclosed by the plaintiff's petition filed herein, were tendered to the initial carrier, the Atchison, Topeka & Santa Fe Railway Company at Watrous, New Mexico, for transportation to Waco, Texas, from a point in one state of the United States to a point in another state of the United States. In bar of the plaintiff's right of recovery herein against these defendants, or any one of them, these defendants plead that on or about October 9th, 1913, the plaintiff herein, B. Leatherwood, and the initial carrier, The Atchison, Topeka & Santa Fe Railway Company, at Watrous, New Mexico, at the time said horses were delivered for shipment to the said Atchison, Topeka & Santa Fe Railway Company by the plaintiff, and before the said horses were loaded on to the car for shipment, entered into and executed a written contract covering the shipment of said horses, which contract the plaintiff alleged in his petition filed herein covered the handling of the plaintiff's horses from Watrous, New Mexico, to Waco, Texas. Said contract so made and executed, among other provisions therein contained, contained the following provision:

"It is further provided that no suit or action against the company for recovery of any damages accruing or arising out of said shipment or any contract pertaining to the same, or the furnishing of facilities for such shipment, shall be sustained in any court of law or equity unless such suit or action shall be commenced within
six months next after the loss or damage shall have accrued.

320 The failure to institute any suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit."

"These defendants allege that the shipment involved in this suit was made on October 9th, 1913, and that plaintiff's suit to recover damages against these defendants arising out of the said shipment of said horses was not filed until the 2nd day of March, 1915, at which said time more than six months had elapsed since the date of said shipment and the accrual of such damages, the time allowed under the contract within which to bring suit for the recovery of such damages arising out of said shipment, as provided for by the terms and provisions of said contract as hereinbefore quoted, and which provision these defendants allege is a reasonable provision as a matter of law.

"Wherefore, by reason of the failure of the plaintiff to comply with the provision of said contract, hereinbefore quoted, which the

plaintiff willingly and voluntarily signed and entered into, and by reason of the failure of the plaintiff to file his suit for damages arising out of the said shipment of horses, within the six months' period after the accrual of said damages, which the plaintiff alleges in his petition was in October, 1913, these defendants here and now plead said provision of said contract as hereinbefore quoted, and the said plaintiff's failure to comply therewith, in bar of the plaintiff's right to recover herein, and pray judgment of the Court thereon." (Tr. p. 21 line 7 to p. 23, line 17.)

Appellee, in his First Supplemental Petition, pleaded as follows: "Replying to paragraph 6 of the Amended Answer of the T. & P. Company and the Katy Company, plaintiff says: The provision of the original so-called contract as set out in said paragraph of said answer was and is unreasonable, illegal, and not binding on plaintiff for the following reasons, to-wit:

"1. It is and was without consideration.

"2. It is unreasonable and oppressive.

"3. It was waived by the said defendants for that they and each of them, refused to accept said stock and to move said stock under and in performance of said contract, and instead of so doing said T. & P. Co. upon receiving said stock at El Paso, before moving same, required plaintiff, shipper in charge of said stock, to make and enter into another and different contract; the seventh paragraph whereof reads as follows, to-wit: 'Seventh: It is further agreed that no suit or action against the company for the recovery of any damages accruing or arising out of said shipment or any contract pertaining to same, or the furnishing of facilities for such shipment, shall be sustained in any Court of law or equity unless such suit or action shall be commenced within two years next after the cause of action shall have accrued.' Wherefore said defendants are estopped from claiming the benefits and provisions of said original so-called contract made with said Santa Fe companies at Watrous, New Mexico." (Tr. p. 43, line 11, to p. 44 line 11.)

A. G. Hood testified as follows:

"My name is A. G. Hood and was employed on or about October 18th, 1913, by the A. T. & S. F. Ry. as station agent at Watrous, New Mexico, about October 8th or 9th, 1913, I had some dealings with B. Leatherwood with reference to a shipment of horses to Waco, Texas, by way of El Paso and a contract was executed covering said shipment, signed by Mr. Leatherwood and myself. He signed the contract in my presence. Mr. Leatherwood wanted to go home and we signed the contract about 6:00 P. M. October 8th, dating it the 9th, with the understanding that I was to deliver it to Mr. Leatherwood's attendant as soon as the stock was loaded. It was signed by Mr. Leatherwood personally. This was about fifteen hours after the horses were penned at Watrous and about twelve hours before the horses were loaded in the cars and was delivered to his attendant only a few minutes after they were loaded. The live stock contract ex-

hibited to me by the Notary and marked Exhibit "A" has the signatures of Mr. Leatherwood and myself on same. (S. F. p. 1 lines 6 to 25) * * * Mr. Leatherwood was given an opportunity to read this contract before he signed." (S. F. p. 1 line 28.)

Exhibit "A" referred to by Mr. Hood, in so far as this assignment is concerned, is as follows:

323 "Defendants here offer certain portions of live stock contract, referred to as Exhibit 'A' in foregoing deposition, covering the carriage of plaintiff's live stock from Watrous, N. M. to Waco, Texas, as follows:

"The Atchison, Topeka & Santa Fe Railway Company.

"Rules and Regulations for the Transportation of Live Stock.

"NOTICE.—This railway has two rates on live stock.

"The rate given under this contract is lower than the rate made by the Railway Company and connections for the transportation of stock at carrier's risk, and without limitation of liability, and is based upon the conditions and agreements found in this contract and upon the valuations therein fixed. The shipper by accepting this condition is deemed to accept the lower rate upon the terms and conditions specified as part of this contract. (S. F. p. 3 line- 1 to 15.) * * *

"This agreement made at Watrous, N. M., station October 9th, 1913, between and on behalf of the above named Railway Company, hereinafter called the Company, and the connecting carriers severally, of the first part, and B. Leatherwood of Watrous, N. M., hereinafter called the shipper, of the second part.

"Whereas, the Company transports live stock as per rules and regulations, all of which are made a part of this contract. (S. F. p. 3, line 24 to p. 4 line 3.) * * *

324 "Ninth. It is further agreed that no suit or action against the Company for the recovery of any damages accruing or arising out of said shipment or of any contract pertaining to the same, or to the furnishing of facilities for such shipment, shall be sustained in any court of law or equity unless such suit or action shall be commenced within six months next after the loss or damage shall have occurred. The failure to institute suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit. * * *

"Thirteenth. In making this contract, the shipper expressly acknowledged that he has had the option of making this shipment under the tariff rates either at carrier's risk or a limited liability, and that he has selected the rate and liability named herein, and expressly accepts and agrees to all the stipulations herein named.

"The signature of the shipper of his agent hereto is and shall be

conclusive evidence that said second party fully understands and assents to all the provisions and conditions of the foregoing contract.

"THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY AND

"CONNECTING CARRIERS SEVERALLY,

By A. G. HOOD.

"B. LEATHERWOOD, *Shipper*.

"Witness:

"A. G. HOOD.

"Contract shows car to be A. T. & S. F. 57289."

(S. F. p. 4 line 24 to p. 5 line 19.)

325 H. HANSBRO testified as follows:

"I had something to do with the handling of car of horses in A. T. S. F. 57289 loaded at Watrous, N. M., October 9th, 1913. I loaded them at Watrous and took them to Las Vegas as conductor of the A. T. & S. F. Railway." (S. F. p. 6 lines 3 to 6.)

S. E. CHASE testified as follows:

"I handled the shipment of horses contained in A. T. S. F. 57289 October 14th and 15th, 1913, as freight conductor for the M. K. & T. Ry. of Texas. I received the shipment at Fort Worth at 10:55 P. M. October 14th, 1913, and delivered it at Bellmead (Waco Yards) at 10:00 A. M. October 15th, 1913." (S. F. p. 71 line 23, to p. 72, line 3.)

FRED CROWDER testified as follows:

"I do know about the shipment of horses made by B. Leatherwood about the 9th of October, 1913, from Watrous, New Mexico, to Waco, Texas, and had something to do with the shipment. I helped to load 32 head of horses on the cars of the Santa Fe Ry. Co. at Watrous, N. M. I also helped bring the horses into the stock pens of the railroad company at that place where they were delivered to the Santa Fe Ry. and loaded into its cars. I went with these horses all the way from Watrous, N. M. to Waco, Texas. In that trip they went over the Santa Fe from Watrous, N. M. to El Paso, Texas; over the Texas & Pacific Ry. from El Paso to Fort Worth, and the Missouri, Kansas & Texas Road received the horses at Fort Worth and carried them from Fort Worth to Waco, Texas." (S. F. p. 27, lines 4 to 16.)

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"Agreement.

"Counsel for defendant T. & P. Ry. Co. and M. K. & T. Ry. Co. of Texas, agreed that when plaintiff's horses reached El Paso

and were delivered to the T. & P. Ry. Co. to be carried on to the final destination, Waco, that the T. & P. Ry. Co. refused to carry the shipment under the original Santa Fe contract executed at Watrous, N. M., and covering the through carriage from Watrous, N. M. to Waco, Texas, but required the execution of a T. & P. contract covering the carriage of the shipment from El Paso to Waco, Texas, which was executed by the shipper's agent who signed the T. & P. Ry. Co. contract at El Paso; likewise when the shipment reached Fort Worth, Texas, the M. K. & T. Ry. Co. of Texas refused to carry the shipment under the original Santa Fe contract referred to, or the T. & P. contract referred to, but required the execution of a M. K. & T. Ry. Co. of Texas contract covering the carriage of the shipment from Fort Worth to Waco, Texas, which was executed by shipper's agent who signed the M. K. & T. Ry. Co. of Texas contract at Fort Worth." (S. F. p. 40.)

Plaintiff's Original Petition was filed in the County Court of Tarrant County, Texas, for Civil Cases, on March 2nd, 1915. (Tr. p. 5.)

Authorities.

A.

Holding that the liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the Carmack Amendment, as measured by the original contract of shipment, so far as it is valid under said act:

- M., K. & T. Ry. Co. vs. Harriman 227 U. S. 657.
- 327 Kansas City Southern Ry. Co. vs. Carl 227 U. S. 639.
- Adams Express Co. vs. Croninger, 226 U. S. 491.
- Union Pacific vs. Wall, 241 U. S. 87.
- Southern Ry. Co. vs. Prescott, 240 U. S. 663.
- C. B. & Q. Ry. Co. vs. Miller 226 U. S., 513.
- Chicago, St. P. M. & O. Ry. Co. vs. Latta 226 U. S. 519.
- Atlantic Coast Line vs. Riverside Mills, 219 U. S. 186.
- G. H. & S. A. Ry. Co. vs. Wallace, 223 U. S. 481.
- N. & W. Ry. Co. vs. Dixie Tobacco Co. 228 U. S. 593.
- C. C. C. & St. L. Ry. Co. vs. Dettlebach 239 U. S. 538.
- N. Y. P. & N. Ry. Co. vs. Peninsula Produce Co. 240 U. S. 341.
- G. F. & A. Ry. Co. vs. Blish Milling Co. 241 U. S. 190.
- Hudson vs. Chicago, St. P. M. & O. Ry. Co. 226 Fed. Rep. 38.

B.

Holding that a stipulation contained in a bill of lading issued by the initial carrier upon an interstate shipment, to the effect that any suit for loss or damage to the shipment while being transported by the initial carrier and the connecting carriers must be filed within

six months next after the said loss or damage occurred is a reasonable stipulation, as a matter of law:

M., K. & T. Ry. Co. vs. Harriman, 227 U. S. 657.

C.

Holding that the initial contract upon an interstate shipment is the only valid contract covering said shipment; and a contract made en route by an intermediate or connecting carrier, is without consideration and void:

M., K. & T. Ry. Co. vs. Ward, 169 S. W. 1035.

A. T. & S. F. Ry. Co. vs. Word, 159 S. W. 375.

C. R. I. & G. Ry. Co. vs. Scott, 156 S. W. 294.

328 N. Y. P. & N. Ry. Co. vs. Peninsula Produce Co. 240 U. S. 341.

G. F. & A. Ry. Co. vs. Blish Milling Co. 241 U. S. 190.

Union Pacific Ry. Co. vs. Wall, 241 U. S. 87.

U. S. Compiled Statutes, Section 8592 Subdivision 11.

U. S. Compiled Statutes, Section 8583 Subdivision 5.

D.

Holding that a person can never be estopped by an act that is illegal and void.

10 Ruling Case Law, page 742.

Lowell vs. Daniels, 61 Am. Decisions, 448.

Railway Co. vs. Henderson, 226 U. S. 44.

Railway Co. vs. Mugg, 202 U. S. 242.

Railway Co. vs. Hefley, 158 U. S. 98.

E.

Holding that recitals in bills of lading signed by carrier and shipper at lawful alternate rates based on valuation constitute admissions by shipper and prima facie evidence of choice of rate and casts upon the shipper the burden of proof to contradict his own admissions.

C. N. O. & P. Ry. Co. vs. Rankin, 241 U. S. 319.

F.

Holding that one is not estopped from asserting the illegality of a contract.

Burke vs. Abbott, 54 S. W. 314.

Pittsburg Construction Co. vs. West Side Belt Company, 151 Fed. 125.

E. E. Taenzer vs. C. R. I & P. Ry. Co. 191 Fed. 543.

G.

329 Authorities supporting the proposition that it is unlawful for a carrier to grant any person or corporation any privilege, or advantage, or discrimination, in interstate commerce. •

Hocking Calley Ry. Co. vs. U. S. 210 Fed. 737.

C. & A. vs. Kirby, 225 U. S. 165.

New Haven Ry. vs. I. C. C., 200 U. S. 403.

Armour & Co. vs. U. S. 209 U. S. 57.

L. & N. Ry. Co. vs. Mottley, 219 U. S. 467.

U. S. vs. Union Stock Yards, 226 U. S. 307.

H.

Subdivision 11 of Article 8592 of the United States Compiled Statutes which was formerly Section 20 and commonly known as the Carmack Amendment provides as follows:

"That any common carrier, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any

• 330 remedy or right of action which he has under existing law."

Subdivision 5 of Article 8583 of the United States Compiled Statutes, provides:

"In all cases where at the time of delivery of property to any railroad corporation being a common carrier for transportation subject to the provisions of this Act to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this Act provided to which through routes and through rates such carrier is a party, the person, firm or corporation making such shipment, subject to such reasonable exceptions and regulation as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in

said bill of lading: Provided, however, that the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported."

Argument.

The case of *M. K. & T. vs. Harriman* 227 U. S. 657 holds in a most decisive manner that a clause in an initial contract covering an interstate shipment to the effect that suit must be filed within ninety days and failure to so file suit will be a bar to the suit, is reasonable as a matter of law and that the state decisions will not govern such a case.

The case of *C. N. O. & T. P. Ry. Co. vs. Rankin*, 241 U. S. 319, holds in a most decisive manner that where the initial bill of lading signed both by the carrier and shipper recited that lawful alternate rates based upon valuation were offered to the shipper and said bill of lading is signed by both carrier and shipper, the same constitutes admissions by the shipper and prima facie evidence of choice of rates and casts upon the shipper the burden of proof to contradict his own admissions.

10 Ruling Case Law, page 742 states the universal doctrine that a person can never be estopped by an act that is illegal and void.

Appellants pleaded the provision in the initial contract executed by the Santa Fe Lines at Watrous, New Mexico, and covering the shipment from Watrous, New Mexico, to final destination, Waco, Texas, to the effect that suit must be brought by the shipper within six months after the loss or damage occurred and failure to bring suit within such time would be a bar to the shipper's recovery and

332 further pleaded that plaintiff had so failed to bring his suit within six months after the loss and damage occurred. Appellants introduced the initial contract containing said provision and introduced plaintiff's original petition showing that suit was brought on March 2nd, 1915, the initial contract being signed on October 9th, 1913. It therefore must be admitted without dispute that under this state of facts appellee would not be entitled to a judgment in this case he having failed to bring suit against appellants within six months after his loss and damage occurred. The only matters left to be determined are, therefore: First—Whether or not the initial contract required to be executed by the initial carrier on through transportation of an interstate shipment is the only, legal, valid, and binding contract that can be made under the Interstate Commerce Act, and the converse of this proposition, whether or not any subsequent contracts made by connecting carriers with the shipper on an interstate shipment and after the initial contract has been signed by the carrier and shipper at the point of origin, are without consideration, illegal, and void. And: Second—Whether or not connecting carriers on an interstate shipment who refuse to carry a shipment under the initial contract issued by the initial carrier for through transportation and demand

the execution of new contract between the shipper and themselves, are thereafter estopped from claiming any benefits under the provisions of the initial contract executed by the initial carrier.

We will take these propositions up in their respective orders. It is our contention and we believe that same is well settled by the United States Supreme Court that the law governing interstate commerce and commonly termed the Carmack Amendment requires the initial carrier to execute a contract on an interstate shipment

and that this contract is the only legal and binding contract that can be made and that any other contracts made

333 by the shipper or connecting carriers en route after the execution of the original contract by the initial carrier are without consideration, illegal and void. The leading case to which all subsequent cases refer, is that of *Atlantic Coast Lines vs. Riverside Mills*, 219 U. S. 186. This case was decided on January 3rd, 1911, and involved the question of whether or not under the Carmack Amendment the initial carrier could limit its liability on an interstate shipment to loss and damage occurring on its own line. The Supreme Court of the United States, speaking through Mr. Justice Lurton, in a very exhaustive opinion fourteen pages in length, held that the initial carrier could not make a contract limiting its liability to loss and damage on its own line, the Carmack Amendment regulating interstate commerce contemplating that the initial carrier should issue a contract for the entire transportation in order that uniformity of handling could be obtained. We desire to make the following quotations from said case:

"The indisputable effect of the Carmack amendment is to hold the initial carrier engaged in interstate commerce and 'receiving property for transportation from a point in one State to a point in another State' as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents. Independently of the Carmack amendment the carrier, when tendered property for such transportation, might elect to contract to carry to destination, in which case it necessarily agreed to do so through the agency of other and independent carriers in the line; or it might elect to carry safely over its own lines only and then

334 deliver to the next carrier, who would then become the agent of the shipper. In the first case the receiving carrier's liability, as carrier, extends over the whole route, for, on obvious grounds, the principal is liable for the acts of its agent. In the other case its carrier liability ends at its own terminal, and its further liability is merely that of a forwarder. Having this power to make the one or the other contract, the only question which has occasioned a conflict in the decided cases was whether it, in the particular case, made the one or the other."

"In this conflicting condition of the decisions as to the circumstances from which an agreement for through transportation of property designated to a point beyond the receiving carrier's line might be inferred, Congress by the act here involved has declared, in substance, that the act of receiving property for transportation to a point in another State and beyond the line of the receiving carrier shall

impose on such receiving carrier the obligation of through transportation with carrier liability throughout. But this uncertainty of the nature and extent of the liability of a carrier receiving goods destined to a point beyond its own line was not all which might well induce the interposition of the regulating power of Congress. Nothing has perhaps contributed more to the wealth and prosperity of the country and the almost universal practice of transportation companies to co-operate in making through routes and joint rates. Through this method a situation has been brought about by which, though independently managed, connecting carriers become in effect one system. This practice has its
335 origin in the mutual interests of such companies and in the necessities of an expanding commerce.

"The tenth clause of the conditions annexed to this bill of lading, and shown elsewhere, affords a fair illustration of the customary methods of connecting carriers to co-operate for their mutual benefit in carrying on transportation begun by one which must be continued by other lines over which the thing to be transported must go. The receiving carrier makes the rate and the route, and as the agent of every such connecting carrier executes a contract which is to bind each of them, "severally," but not jointly," one of the terms of the agreement being that each carrier shall be liable only for loss or damage occurring on its own line. Through this well know- and necessary practice of connecting carriers there has come about without unity of ownership or physical operation, a singleness of charge and a continuity of transportation greatly to the advantage of the carrier and beneficial to the great and growing commerce of the country.

"Along with this singleness of rate and continuity of carriage there grew up the practice by receiving carriers, illustrated in this case, of refusing to make a specific agreement to transport to points beyond its own line, whereby the connecting carrier for the purpose of carriage would become the agent of the primary carrier. The common form of receipt, as the court may judicially know, is one by which the shipper is compelled to make with each carrier in the route over which his package must go a separate agreement limiting the carrier's liability of each separate company to its own part of
336 the through route. As a result the shipper could look only to the initial carrier for recompense for loss, damage, or delay occurring on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the packages might and usually did continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment. But here, in turn, he might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged and had no access to the records of the connecting carriers who in turn had participated in

some part of the transportation, he was compelled in many instances to make such settlement as should be proposed.

"This burdensome situation of the shipping public in reference to interstate shipment over routes including separate line- of carriers was the matter which Congress undertook to regulate. Thus when this Carmack amendment was reported by a conference committee, Judge William Richardson, a Congressman from Alabama, speaking for the committee of the matter which it was sought to remedy, among other things, said:

"One of the great complaints of the railroads has been—and, I think, a reasonable, just, and fair complaint—that when a man made a shipment, say, from Washington, for instance, to San Francisco, Cal., and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute his suit. The
337 result was that he had to settle his damages at what he could get. What have we done? We have made the initial carrier, the carrier that takes and receives the shipment, responsible for the loss of the article in the way of damages. We save the shipper from going to California or some distant place to institute his suit. Why? The reasons for inducing us to that were that the initial carrier has a through route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the institution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but that the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the co-operation, the through route courtesies between them would be broken up if prompt payment were not made. We have done that in conference." (Cong. Rec. Pt. 10, p. 9580.)

"It must be conceded that the effect of the act in respect of carriers receiving packages in one State for a point in another and beyond its own lines, is to deny such an initial carrier the former right to make a contract limiting liability to its own line.

"It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent
338 of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests. Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the States being one of them, the power is absolute except as limited by other provisions of the Constitution itself.

"That a situation had come about which demanded regulation in the public interest was the judgment of Congress. The requirement that carriers that undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be

required as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adapted to secure the right of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier. Neither does the regulation impose an unreasonable burden upon the receiving carrier. The methods in vogue, as the court may judicially know, embrace not only the voluntary arrangement of through routes and rate, but the collection of the single charge made by the carrier at one or the other end of the route. This involves

339 frequent and prompt settlement of traffic balances. The routing in a measure depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again, the business association of such carriers affords to each facilities for locating the primary responsibility as between themselves which the shipper cannot have. These well-known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves.

"If it is to be assumed that the ultimate power exerted by Congress is that of compelling co-operation by connecting lines of independent carriers for purposes of interstate transportation, the power is still not beyond the regulating power of Congress, since without merging identity of separate line or operation it stops with the requirement of oneness of charge, continuity of transportation and primary liability of the receiving carrier to the shipper, with the right of reimbursement from the guilty agency in the route.

"In substance Congress has said to such carriers, 'If you receive articles for transportation from a point in one State to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuation of the transit, you must use them as your own agents and not as agents of the shipper.' It is, therefore, not the case of making one pay the

340 debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable."

The above quoted case was followed by another opinion of the Supreme Court of the United States written again—by Mr. Justice Lurton, to wit: the case of Adams Express Co. vs. Croninger, 226 U. S. 491. In this case there was involved the validity of a provision in the bill of lading limiting the carrier's liability to an agreed value of \$50.00. As said in this case, the Carmack amendment undoubtedly showed the purpose of Congress to bring contracts for interstate shipments under one uniform rule of law and therefore withdraw them from the influence

of state regulations. Justice Lurton held in this case that the provision limiting the carrier's liability to \$50.00 was valid and that the shipper could not recover any greater sum from the carrier. Closely following this decision is that of the United States Supreme Court in the case of *Kansas Southern Railway Company vs. Carl*, the opinion of which was agains rendered by Mr. Justice Lurton. The question in this case was whether or not the final carrier in the route was entitled to the benefit of a stipulation in an iritial contract signed by the shipper releasing the initial carrier and all subsequent carriers from any loss or damage in excess of \$5.00 per cwt. In discussing this case, Justice Lurton said:

"As the shipment was interstate, the contract was controlled by the twentieth section of the Act of Congress of June 29th, 1906. The initial carrier under that provision of the Interstate Commerce Act, as an interstate carrier, holding itself out to receive shipments from a point upon its own line in one State to a point in another State upon the line of a succeeding and connecting carrier, came under liability not only for its own fault but also for loss or damage upon the line of a connecting carrier in the route: *Atlantic Coast Line vs. Riverside Mills*, 219 U. S. 186. Any stipulation in its own receipt was ineffective in so far as it was not authorized by the section of the act referred to, whether intended for its own benefit or that of the succeeding carrier. It is true that any limitation of liability contained in its contract which would be valid in its own behalf would likewise inure to the benefit of its connecting carrier. The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the Act. This provision of the Interstate Commerce Act has been so fully considered and decided that we need not go further into the matter.

"That amendment undoubtedly manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule or law, and therefore, withdraw them from the influence of state regulation. *Adams vs. Croninger*, above cited. Every such initial carrier is required "to issue a receipt or bill of lading therefor" when it receives property for transportation from one state to another. Such initial carrier is made liable to the holder of such receipt for any loss or damage "caused by it," or by any connecting carrier in the route to whom it sha'll make delivery. It is then declared that no contract, receipt, rule, or regulation shall 'exempt' such a common carrier 'from the liability hereby imposed.'"

342 In this case the Supreme Court held that the final carrier was entitled to the benefits of the provisions contained in the initial contract.

In the case of *Cleveland, St. Louis Ry. Co. vs. Dettleback*, the Supreme Court of United States held that the terminal carrier on an interstate shipment was entitled to the benefit of a provision in the initial contract releasing the value of the goods in the shipment, although the goods were lost by the terminal carrier while in the capacity of a ware-houseman.

Mr. Justice Hughes in the case of *N. Y. P. & N. Ry. Co. vs. Peninsula Produce Exchange of Maryland*, 240 U. S. page 34, said:

"We need not review at length the considerations which led to the adoption of this amendment. These were stated in *Atlantic Coast Line vs. Riverside Mills*, 219 U. S. 186, 199,—203. It was there pointed out that along with singleness of rate and continuity of carriage in through shipments there had grown up the practice of requiring specific stipulations limiting the liability of each separate company to its own part of the through route, and, as a result, the shipper could look to the initial carrier for recompense only 'for loss, damage, or delay' occurring on its own line. This 'burdensome situation' was the 'matter which Congress undertook to regulate.' And it was concluded that the requirement that interstate carriers holding themselves out as receiving packages for destinations beyond their own terminal should be compelled, 'as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies,' was within the power of Congress. The rule, said the

343 court in defining the purpose of the Carmack Amendment, 'is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility.' And, again, we said in *Adams Express Company vs. Croninger*, 226 U. S. 491, that this legislation embraces 'the subject of the liability of the carrier under a bill of lading which he must issue.' 'The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.'"

In this case the Supreme Court held that the Carmack Amendment imposed on the initial carrier liability for delay occurring on the line of its connecting carrier without physical damage to the property.

Justice Hughes followed this opinion by that of *Southern Railway Company vs. Prescott*, 240 U. S. 633. In this case when the shipment arrived at the point of destination the terminal carrier notified the consignee of the arrival of the boxes, thereupon the consignee paid the entire freight charges on same and took four of the thirteen boxes away with him and the other nine boxes were left with the terminal carrier under an agreement that the terminal carrier would keep them until the consignee had time to take them away. The remaining nine boxes were destroyed by fire. The terminal carrier pleaded a provision in the bill of lading issued by the initial carrier and the consignee took the position that there had been a delivery of the goods by the terminal carrier to the consignee, that the freight

344 had been paid, and that the goods thereafter did not constitute a part of the interstate shipment and that the loss of same by the terminal carrier was governed by the state law. In fact the Supreme Court of South Carolina took this position. In discussing this matter Justice Hughes, said:

"As the shipment was interstate, and the bill of lading was issued

pursuant to the Federal Act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. The reference, above quoted, to the concession in the trial court cannot be taken to mean that this Federal question was not raised, for, as we have seen, it was distinctly presented and pressed; but we assume that the ruling, in substance, was that there was no dispute as to the fact that the goods had arrived, that the consignee, had paid the freight and signed a receipt for the goods, and that the nine boxes had remained in the possession of the carrier under the permission given, as testified, by the carrier's agent. The question is whether this admitted transaction had the legal effect of discharging the contract governed by Federal law and of creating a new obligation governed by state law.

"It is also clear that with respect to the service governed by the Federal statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (*Tex. & Pac. Rwy. v. Mugg*, 202 U. S. 242; *Kansas Southern Rwy. v. Carl* 227 U. S. 639, 652; *Boston & Maine R. R. v. Hooker*, 233 U. S. 97, 112; *Louis. & Nash. R. R. v. Maxwell*, 237 U. S. 94), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the Act. *Chicago & Alton R. R. vs. Kirby*, 225 U. S. 155, 166; *Atchison, &c. Ry. vs. Robinson*, 233 U. S. 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend "any privileges or facilities," save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling and the parties cannot substitute therefor a special agreement.

"It is apparent that there had been no actual delivery of the nine boxes. The payment of the freight had no greater efficacy than if it had been made in advance of the transportation. The giving of a receipt for the goods by the consignee did not alter the fact that they were still held by the Railway Company awaiting actual delivery. The transaction at most could not be deemed to accomplish more than if the parties had agreed that until such delivery the goods should be held under a special contract—in lieu of the prescribed conditions, and this they could not effect without violating the Act which governed the shipment. It could not be said, for example, that while under the filed regulations the Railway Company was to make a 'reasonable charge for storage' pending delivery that it could agree with a particular shipper or consignee, to hold gratuitously; nor could it alter the terms of its responsibility while the goods remained undelivered. The actual service in holding the goods continued and we must look to the bill of lading to determine the legal obligation attaching to that service."

We call to the attention of this court the words of Judge Hughes—

"that even though the parties to the shipment had entered into a special contract in lieu of the prescribed conditions in the initial bill of lading, yet said subsequent contract would be a variation of the act which governed the shipment.

In the case of *Union Pacific vs. Wall*, 241 U. S. page 87, decided by the Supreme Court of the United States on April 24th, 1916, the Court held that a stipulation in a bill of lading on an interstate shipment of cattle, that the shipper must, as a condition precedent to his right of recovery for injury to the cattle while in transit, give notice thereof in writing to some officer or agent of the initial carrier before the cattle are removed from the pens at destination or mingled with other live stock, is to be construed in the light of the Carmack Amendment making the connecting or delivering carrier the agent of the initial carrier, and further holding that said stipulation was reasonable, and that failure to comply with same by the shipper was a bar to his recovery. In rendering the decision in this case Justice Van Devanter said:

"A bill of lading is a contract within this rule. The Carmack Amendment to the Interstate Commerce Act (#7, C. 3591, 34 Stat. 584, 593), which was in force when this bill of lading was issued, directs a carrier receiving property for interstate transportation to issue a through bill of lading therefor, although the place of destination is on the line of another carrier; subjects the receiving carrier to liability for any injury to the property caused by it or any other carrier in the course of the transportation, and requires a connecting carrier on whose line the property is injured to re-imburse the receiving carrier where the latter is made to pay for such injury. Thus, under the operation of the amendment, the connecting carrier becomes the agent of the receiving carrier for the purpose of completing the transportation and delivering the property.

The last named case was followed by *Georgia, Florida & Alabama Ry. Co. vs. Blish Milling Co.*, 241 U. S. 190. This case was decided on May 8th, 1916, and the opinion was delivered by Mr. Justice Hughes. In this case Judge Hughes says:

"These decisions also establish that the question as to the proper construction of the bill of lading is a Federal question.

"There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. The statute casts upon the initial carrier responsibility with respect to the entire transportation. The aim was to establish unity of responsibility, (*Atlantic Coast Line vs. Riverside Mills*, 219 U. S. 186, 199—203; *N. Y. P. & N. R. R. vs. Peninsula Produce Exchange*, 240 U. S. 34, 38), and the words of the statute are comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation which, as defined in the Federal Act, includes delivery. It

is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carrier makes a misdelivery, the initial carrier is liable; and when it inserts in its bill of lading a provision requiring reasonable notice

of claims 'in case of failure to make delivery,' the fair meaning of the stipulation is that it includes all cases of such failure, as well those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms. (*Kansas Southern Ry. vs. Carl*, *supra*; *Southern Railway vs. Prescott*, *supra*); and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery. The clause gave abundant opportunity for presenting claims and we regard it as both applicable and valid.

"In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but as the court said, 'if we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivering carrier.' 15 Ga. App. p. 147. It is urged however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act: Nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. *Chi. & Alt. R. R. vs. Kirby*, 225 U. S. 153, 166; *Kansas Southern Ry. vs. Carl*, *supra*; *A. T. & S. F. Ry. vs. Robinson*, 233 U. S. 173, 181; *Southern Ry. vs. Prescott*, *supra*. We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it."

We believe that this case settles the point involved in this suit. Judge Hughes holds that a connecting carrier takes the goods under the bill of lading issued by the initial carrier and its obligations are measured by its terms, and he further holds that the parties interested in a shipment cannot waive the terms of the initial contract under which the shipment was made, pursuant to the Federal Act nor can the carrier by its conduct give the shipper the right to ignore those terms which are applicable to that conduct and hold the carrier to a different liability to that fixed by the agreement under the published tariff and regulations. To do so, says Judge Hughes, would antagonize the plain policy of the Act and open the door to the very abuse at which the Act was aimed. If connecting carriers could waive and modify the provisions of the initial contract issued by the initial carrier under the Carmack Amendment, it would result in discrimination and unfair practices. For instance,

take the carrier interested in this suit. We will assume that B. Leatherwood is a small shipper and after the initial contract was signed by him at Watrous, New Mexico, calling for the through transportation of his horses to Waco, Texas, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas refused to recognize the initial contract and sought to modify same and waive its provisions. Thereupon B. Leatherwood was required to execute a new contract. In another case we will presume a large shipper is interested and the connecting carriers, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, do not care to dictate terms of carriage to the large shipper and they therefore accept and carry the large shipper's stock under the provisions of the initial contract. When they do this they produce a discrimination and they are not treating the shippers on the same basis. It was for this reason that Congress passed the Carmack Amendment to make a uniform rule governing Interstate shipments and it is for this reason that the initial contract is the only valid and legal contract governing a shipment of interstate commerce and it is for this reason that any subsequent contract made between any connecting carrier and the shipper is illegal, without consideration, and void. This question has been passed upon by two of the Courts of Civil Appeals in Texas. In the case of *A. T. & S. F. vs. Word*, 159 S. W. 375 Word sued the A. T. & S. F. and the F. W. & D. C. Ry. Cos. for damages to a shipment of cattle upon a contract issued by the initial carrier, the F. W. & D. C. Ry. Co., at Simons, Texas, the cattle to be transported to Summit, Kansas. The intermediate carriers, the A. T. & S. F. and Southern Kansas Ry. Cos. pleaded a subsequent contract made in route and the Court of

Civil Appeals at Amarillo in discussing the subsequent contract made by the intermediate carriers said:

"If the Fort Worth & Denver Railway Company was a principal in making the contract for the through shipment and received the consideration therefor, the act of the Santa Fe procuring a contract for such shipment over the same route, was, as we think, without consideration and contrary to law. It was but the agent of the Denver Road and under the law was charged with the duty of carrying out the contract of its principal, with no right or power to engraft new conditions and stipulations on the contract already lawfully executed, binding it fully to perform its part of the contract of carriage under the terms of said contract. Stipulations in the contract of the initial carrier were ineffectual insofar as not authorized by the interstate commerce act, whether for its benefit or that of the intermediate carrier. Any provision valid in the initial carrier's contract for its own benefit will therefore inure to the benefit of the connecting carrier. *Kansas City S. R. Co. vs. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. — In that case it is said 'The liability of any carrier in the route * * * for loss or damage is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act.' *Adams Express Co. vs. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, L. Ed. 314; *Railway Co. vs. Latta*, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. 328;

Railway Co. vs. Miller, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323; Railway Co. vs. Harriman Bros., 227 U. S. 657 33 Sup. Ct. 397, 57 L. Ed. —.

352 "It will be seen from the above authorities that the contract of the initial carrier is one fixing the liability of the parties executing the contract, as well as that of the connecting carrier. It follows that any contract made, or attempted to be made, by the intermediate carrier has no binding effect with reference to the shipment while in the course of transportation. The case of Railway Co. vs. Carl, *supra*, appears to be authority for the shipper to sue the intermediate carrier direct. Railway Co. vs. Ray, 127 S. W. 281. And we hold that he may sue the initial carrier, together with the connecting carriers, over whose lines of road the shipment is routed, and the respective liabilities of the parties fixed in that suit."

We especially direct the attention of this Court to the fact that the Supreme Court of the State of Texas approved the Word case having denies a writ of error. The same question was also presented to the Court of Civil Appeals at Austin in the case of M. K. & T. vs. Ward, 139 S. W. 1035. Judge Rice speaking for the Court of Civil Appeals in a very full opinion after reviewing the opinions of the Supreme Court of the United States, approved the decision of Chief Justice Huff in the Word case, saying:

In "The Atchison, Topeka & Santa Fe Railway Co. vs. Word, *supra*, where a similar question to the one here presented was involved, Mr. Justice Huff of the Amarillo Court of Civil Appeals, said:

"If the Fort Worth & Denver Railway Company was a principal in making the contract for the through shipment and received the consideration therefor, the act of the Santa Fe procuring a contract for such shipment over the same route was, as we think, without consideration and contrary to law. It was but the agent of the Denver Road, and under the law was charged with the duty of carrying out the contract of its principal, with no right or power to ingraft new conditions and stipulations on the contract already lawfully executed, binding it fully to perform its part of the contract of carriage under the terms of said contract. Stipulations in the contract of the initial carrier were ineffectual in so far as not authorized by the interstate commerce act, whether for its benefit or that of the intermediate carrier. Any provision valid in the initial carrier's contract for its own benefit will therefore enure to the benefit of the connecting carrier"—citing, Kansas City S. R. Co. vs. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683.

"In that case it is said:

"The liability of any carrier in the route * * * for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act," citing Adams Express Company vs. Crominger, *supra*, and the other cases relied upon by appellees.

"Concluding he says:

"It will be seen from the above authorities that the contract of

the initial carrier is one fixing the liability of the parties executing the contract, as well as that of the connecting carrier. It follows that any contract made, or attempted to be made, by the intermediate carrier, has no binding effect with reference to the shipment while in the course of transportation. The case of *Railway vs. Carl*, supra, appears to be authority for the shipper to sue the intermediate carrier direct. *Ry. Co. vs. Ray*, 127 S. W. 281. And we hold that he may sue the initial carrier, together with the connecting carriers, over whose lines of road the shipment is routed, and the respective liabilities of the parties fixed in that suit.

"In this case writ of error was denied by the Supreme Court; and, as the doctrine therein announced is applicable to the instant case, we think it decisive of the question here presented, and overrule the first assignment."

Under the decisions of the Supreme Court of the United States as well as the decisions of the Courts of Civil Appeals of Texas, there can be no doubt that the subsequent contracts made by the Texas & Pacific Ry. Co. and the Missouri, Kansas & Texas Ry. Co. of Texas, on this shipment were illegal, without consideration, and void. The only remaining question is whether or not by reason of their act in refusing to transport the shipment of appellee under the provisions of the initial contract and demanding the execution of the subsequent contracts, thereby they estopped themselves from asserting any benefits under the initial contract. In Vol. 10 Ruling Case Law, page 742, sec. 59, it is said:

"Under the rule that a person can never be estopped by an act that is illegal and void a married woman is not estopped by a contract which she has no legal capacity to make. So she is not estopped to claim her land as against a contract for the sale thereof not acknowledged by her as required by statute."

In the case of *Illinois Central Ry. Co. vs. Henderson Elevator Co.*, 226, U. S. 441, the Supreme Court of the United States held that a railway company was not estopped from collecting the published tariff rate from the shipper notwithstanding a lower rate may have been quoted to the shipper by the carrier's agent. The reason for this rule is that it was unlawful for the carrier to transport the shipper's goods for a less rate than the published rate and an act of the carrier or its agent in quoting the shipper a less rate would not estop it from collecting the proper rate. A very good illustrations of this doctrine may be found in the following case: A railway company enters into a contract to transport and deliver a carload of wheat from the State of Texas to the State of Missouri. The shipper agrees to pay the railway company the legal rate for said shipment. After the shipment is under way and when it reaches the terminal carrier, the terminal carrier enters into a second contract with the shipper to the effect that it will not collect the legal rate called for by the initial contract, but it agrees to charge and collect only one-half of the legal rate on said shipment. The shipper pays $\frac{1}{2}$ of the legal rate as agreed upon between him and the subsequent carrier by reason of such subsequent contract and later the subsequent and terminal carrier brings suit against the shipper to collect the full

rate as specified in the original or initial contract. The shipper answers: You refused to accept the full rate named in the initial contract. You waived it and entered into a contract with me to charge only $\frac{1}{2}$ of the rate named in the initial contract and
356 you are now estopped from claiming any benefit under the initial contract. The only logical answer to such a case is that the act of the terminal carrier in entering into the subsequent contract was illegal and void and that the subsequent carrier was not estopped from collecting the legal rate contained in the initial contract. Such have been the decisions of all the courts. In fact the case of Texas & Pacific Ry. Co. vs. Mugg went to the Supreme Court of the United States from this Court and it was there held that the railway company was required to collect the correct legal charges although it had previously agreed to transport same for less. See *Railway vs. Mugg*, 202 U. S. 242.

We might add in this connection that appellee by his pleading of estoppel sought to estop the appellants from claiming the benefit of the initial contract by reason of the fact that appellee and appellants abandoned the initial contract and entered into subsequent contracts which were illegal and void. If we concede that the subsequent contracts made by appellants and appellee were illegal and void, as we must necessarily do under the cases heretofore cited, then appellee was a party to an illegal act and was in *pari delicto*. Appellee being equally guilty of an illegal act, the doctrine of *pari delicto* would prevent appellee from asserting the estoppel pleaded by appellee. In other words, appellee seeks to estop appellants from claiming the benefits under the initial contract by reason of appellants' illegal act in entering into subsequent contracts with appellee. Appellee being a guilty party to said illegal acts, neither this court nor any other court would allow appellee to argue that appellants were estopped by illegal acts in which appellee himself participated.

357 In conclusion we desire to say that anyone who has kept in close touch with the prevailing decisions regarding interstate commerce must necessarily be impressed with the consistent demand on the part of the interstate authorities that carriers shall treat all shippers alike; that no discriminations will be allowed; that no shipper will be given an advantage that another shipper does not enjoy. For this reason in many cases where shippers fail to file suit within the time provided by the bill of lading and shippers requested the carrier to waive the stipulation as to the time within which suit must be filed, the carriers have been compelled to refuse to waive such stipulations for the reason that if the carriers made the agreement to waive the provision in one case and denied to do so in another, the carriers were guilty of discrimination. So we therefore see the necessity of having one contract issued by the initial carrier to govern the shipment throughout its journey, the provisions of which cannot be waived either expressly or by the carriers' conduct. For the rule to be otherwise would open the door for fraud and discrimination. We have cited the court under the list of authorities to cases holding that it is unlawful

for a railroad to grant any person or corporation any privilege or advantage under the interstate commerce act. We call the attention of the court to the case of Hocking Valley Railway Co. vs. U. S. 210 Fed. 737 where the carrier was fined \$42,000.00 for granting to one of the shippers the privilege of paying its freight on the credit system, when it demanded cash from other shippers.

Under the decisions of the United States Supreme Court as well as our Courts of Civil Appeals of Texas and our Supreme Court of Texas, we respectfully ask this Honorable Court to sustain this assignment of error and to reverse and render this cause for appellants.

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II.

The construction of the initial contract or bill of lading issued by the initial carrier and covering the shipment from Watrous, New Mexico, to Waco, Texas, being governed by the laws of the United States, raises a Federal question. The appellants pleaded a provision of the initial contract to the effect that while the horses were being transported from Watrous, New Mexico, to Waco, Texas, that the shipper at his own risk and expense was to load, unload, and reload and feed, water, and rest the horses while in transit. And further in the event the carrier furnished laborers to assist in the loading, unloading, and reloading of said stock, it was understood that such laborers were furnished for the accommodation of the shipper and were entirely subject to the shipper's orders and were to be considered the shipper's employees while so engaged. And further pleaded that if appellee's horses were injured while being handled by the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, same was due to the negligence of appellee and appellee's agents in failing to perform the duties provided in the provision of the initial contract pleaded. Evidence having been introduced that there was offered to appellee facilities for unloading and reloading, watering, feeding, and resting said horses while en route, and evidence being introduced that the said initial contract or bill of lading was issued upon a choice of two rates selected by the shipper, said provision pleaded was reasonable and the Court of Civil Appeals erred in overruling appellants' fifth assignment of error.

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Statement.

Appellants' Fifth Assignment of Error was:

"The Court erred in failing and refusing to give defendants' special charge No. 5 for the reason that said charge correctly presented the law with reference to the matters contained therein, the same not being covered by the Court's main charge, and same being raised by the pleadings and evidence bearing upon a material and important issue in the case. All of which is more fully set out in defendants' Bill of Exception No. 12, which is here referred to and made a part hereof."

Appellants's special charge No. Five was as follows:

"GENTLEMEN OF THE JURY: You are instructed that it was the duty of the plaintiff's agent who accompanied the shipment of horses from El Paso to unload, reload, and to feed and water the horses in the shipment while in the course of transportation, and while in the cars and in the pens of the defendant between the points, in the event the Texas & Pacific Railway Company afforded to the plaintiff and his agent facilities for so doing; and you are further instructed that if you find and believe from the evidence that facilities were furnished to the plaintiff or his agent for feeding and watering said horses en route from El Paso to Fort Worth, Texas, and at Fort Worth, Texas, then, even though you may find that the plaintiff's said horses were damaged by reason of their failure to have feed and water between and at said places, you are instructed to return a verdict for the defendant, Texas & Pacific Railway Company as to the damages, if any, caused by the failure of the said horses to have feed and water between said points." (Tr. p. 60 line 7, to p. 61 line 6.)

360 Appellant, Texas & Pacific Railway Company, excepted to the refusal of the Court to submit Special Charge No. 5 setting out its reasons. (Tr. page 183, line 22, to page 85, line 1.)

Appellee pleaded in his First Amended Original Petition:

"Said horses were reloaded at Big Spring for further transportation about 9 o'clock P. M., October 13th, 1913. If defendant T. & P. Company and Katy Company had exercised ordinary care to handle and transport said horses from Big Spring to Waco, they would have reached their destination within about 24 hours from the time they were reloaded at Big Spring and it would have been unnecessary to have again unloaded and fed them en route, yet so to do said defendants negligently and carelessly failed and refused. Instead of so doing, they gave said horses a very slow run, and negligently kept them confined in the car without food and water, and with no opportunity to rest for a continuous period of about 43 hours, whereby said horses were greatly injured and damaged and depreciated in value. The horses reached Waco and were unloaded there sometime during the afternoon or night of October 15th, 1913, in very poor condition. Said defendants negligently failed to provide any facilities, and to afford plaintiff any opportunity to unload, feed, and rest said horses on the run from Big Spring to Waco." (Tr. p. 14, line 23, to p. 15 line 15.)

Appellants in their first amended Original Answer pleaded as follows:

"By way of still further and special answer herein, if so required, these defendants plead as a bar to the plaintiff's right of
361 recovery herein against them, or either of them, for any damages which the plaintiff alleges his horses may have suffered by reason of their being held and delayed without, feed, water, and rest en route, the following facts:

"These defendants alleged that one of the provisions of the con-

tract made and entered into, and which is described in the next preceding paragraph herein covering the transportation of said shipment of horses from Watrous, New Mexico, the point of origin, to Waco, Texas, the point of destination, was as follows:

"That — his or their own risk and expense, the shipper will load the stock at the first named station, take care of, feed, and water and attend to the same while they may be in the stock yards of the company or lots where waiting shipment, and while the same is being loaded, transported, unloaded, and reloaded, and to load, unload, and reload the same at feeding and transfer or other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and thereby agrees that the company shall not be liable for any loss or damage to said stock while being so in the shipper's charge, and so cared for and attended to by the shipper or his or their employees as aforesaid; and in case where
362 the company shall furnish laborers to assist in the loading, unloading, and reloading of said stock, it is understood they are furnished for the accom-odation of the shipper, and that they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employees while so engaged, and the company shall in no wise be liable for their acts of negligence."

"Wherefore, these defendants say that under the terms and provisions of the contract as hereinbefore quoted, it was the duty of the plaintiff, or his agent in charge of said stock, to look after and care for, attend to and to feed and water the said stock while en route, and these defendants say and allege that if the said stock were not given all of the feed, water, and rest which the agent of the plaintiff in charge of said horses wished them to have, and if the plaintiff's horses suffered any damages by reason of lack of feed, water, and rest en route, then said damages were due to the negligence of the plaintiff's said agent or employe who was in charge of the said shipment and whose duty it was, under the terms and provisions of the said contract of shipment to see that the said horses were properly fed, watered, and rested while en route, and these defendants here and now plead such negligence in bar of any recovery herein." (Tr. p. 23, line 19, to p. 25 line 19.)

There was introduced in evidence the initial contract:

"The Atchison, Topeka & Santa Fe Railway Company.

"Rules and Regulations for the Transportation of Live Stock.

"NOTICE.—This Railway has two rates on live stock.

363 "The rate given under this contract is lower than the rate made by the Railway Company and connections for the transportation of stock at carrier's risk, and without limitation of liability, and is based upon the conditions and agreements found in this contract and upon the valuations therein fixed. The shipper

by accepting this condition is deemed to accept the lower rate upon the terms and conditions specified as part of this contract. (S. F. p. 3 lines 1 to 15.) * * *

"This agreement made at Watrous, N. M. station October 9th, 1913, between and on behalf of the above named railway company, hereinafter called the Company, and the connecting carriers severally, of the first part, and B. Leatherwood of Watrous, N. M., hereinafter called the shipper, of the second part.

"Whereas, the Company transports live stock as per rules and regulations, all of which are made a part of this contract. (S. F. p. 3 line 24, to p. 4 line 3.)

"Fifth. That at his or their own risk and expense the shipper will load the stock at the first named station, take care of, feed and water and attend to same while they may be in the stock yards of the Company or lots where awaiting shipment; and while the same is being loaded, transported, unloaded, and reloaded, and to load, unload, and reload the same at feeding and transfer and other points wherever the same may be unloaded for any purpose whatever, and will properly attend to and care for the stock while in the cars in transit or otherwise, and hereby agrees that the Company shall not be liable for any loss or damages to said stock while being so in the shipper's charge, and so cared for and attended to by the shipper or his or their employes as aforesaid; and in cases where the Company shall furnish laborers to assist in the loading, unloading or reloading of said stock, it is understood they are furnished for the accommodation of the shipper, and they shall be entirely subject to the shipper's orders, and shall be deemed the shipper's employes while so engaged, and the Company shall in no wise be liable for their acts of negligence." (Tr. p. 4, lines 3 to 21.)

"Thirteenth. In making this contract, the shipper expressly acknowledged that he has had the option of making this shipment under the tariff rates either at carrier's risk or a limited liability, and that he has selected the rate and liability named herein, and expressly accepts and agrees to all the stipulations herein named.

"The signature of the shipper or his agent hereto is and shall be conclusive evidence that said second party fully understands and assents to all the provisions and conditions of the foregoing contract.

"THE ATCHISON, TOPEKA AND SANTA FE
RAILWAY COMPANY AND CONNECTING CARRIERS SEVERALLY,

By A. G. HOOD.

"B. LEATHERWOOD, *Shipper*.

Witness:

A. H. HOOD.

"Contract shows car to be A. T. & S. F. 57289."

(S. F. p. 4 line 24 to p. 5 line 19.)

FRED CROWDER, a witness for appellee, testified as follows:

"I went with the horses all the way from Watrous, N. M. to Waco, Texas." (S. F. p. 27, lines 11 to 13.) * * * "The horses were not fed properly from Big Springs, Texas, to Waco, Texas, and also were not watered between those points. They were, to the best of my recollection, for forty-two hours without feed or water." (S. F. p. 29, lines 10 to 14.)

He further testified:

335 "My answer is, they were injured and damages to some extent by reason of the fact that they were without food and water between Big Springs, Texas, and Waco, Texas." (S. F. page 30, line 6.)

Authorities.

A.

Holding that a stipulation in an interstate contract issued by an initial carrier to the effect that shipper shall feed, water, rest, load, unload, and reload his stock while in transit is reasonable and valid.

Webster vs. Union Pacific, 200 Fed. 598.

M. K. & T. vs. Harriman, 227 U. S. 657.

B.

Holding that in order for the doctrine of estoppel to be invoked, same must be pleaded.

Young Men's Christian Ass'n of Dallas vs. Schow Bros., 161 S. W. 931.

Argument.

We have discussed at full length under paragraph I of this motion the question of whether or not the initial contract issued by the initial carrier at Watrous, New Mexico, continued in full force and effect with respect to appellee's horses from Watrous, New
366 Mexico, to Waco, Texas, notwithstanding subsequent contracts were demanded by the connecting carriers and were executed by appellee's agent. In this complaint, however, we are not directly concerned with this particular question for the reason that appellee pleaded in the former case that the appellants were estopped from claiming the benefits of the stipulations in the initial contract requiring suit to be brought within six months after any loss or damage occurred for the reason that appellants had refused to carry the shipment under the initial contract and had demanded the execution of new contract in route, which was accomplished. However, in this case appellants pleaded in paragraph 7 of their amended answer (Tr. p. 23) the provision in the initial contract

executed at Watrous, New Mexico, to the effect that the shipper should load, unload, reload, feed, water, and rest his stock in transit, and in reply to said pleading of appellants, appellee in his first supplemental petition in paragraph 4 thereof (Tr., p. 44) pleaded:

"Replying to the 7 and 10 paragraph of said answer of said defendants, plaintiff says that the provision of said contracts so plead by defendants are illegal, null and void, for the following reasons to wit:

"1. Said contracts are without consideration.

"2. Plaintiff's shipper was required to sign said T. & P. contract at El Paso under duress, and as a condition precedent to the movement of said stock over said defendants' lines. Wherefore, said so called contract was, and is not binding on plaintiff.

"3. Said defendants assumed the duty of watering and feeding said stock, and negligently failed to do so.

367 "4. Said defendants negligently failed to provide plaintiff any facilities for feeding and watering said stock between Big Spring and Waco. Wherefore, said provision of said contract is not binding on plaintiff, and they failed and refused to afford plaintiff's agent in charge of said stock any opportunity to properly feed and water and rest same between Big Spring and Waco."

It will thus be noted that appellee did not plead that appellants were estopped from asserting the protection afforded in the provision of the initial contract to the effect that shipper and his agent should load, unload, reload, feed, water, and rest his stock while in transit. Not having pleaded estoppel, appellee is not entitled to this relief. Therefore we must take the position that the initial contract executed by the Santa Fe lines at Watrous, New Mexico, was a valid contract and covered the shipment from Watrous, to Waco, and the provision which required the shipper or his agent to load, unload, reload, feed, water, and rest the stock while in transit between said points inured to the benefit of appellants. The evidence showing conclusively that appellee's horses did suffer damage by reason of their failure to have water between Big Spring and Waco, the court should have granted appellants' Special Charge No. 5, charging the jury that if they found and believed that the Texas & Pacific Railway Company offered to appellee reasonable facilities for loading, unloading, reloading, feeding, watering, and resting his horses while in transit from El Paso to Fort Worth, then as to such damage as the horses suffered they would not hold the Texas & Pacific Railway Company liable.

In this connection we desire to direct the court's attention to the case of Webster vs. Union Pacific Ry. Co. 200 Fed. 598. In 368 this case the Federal District Court of Colorado in passing upon a provision in an interstate contract similar to the one we have under consideration here, said:

"2. The fourth defense sets up a special reduced rate of freight and a special contract of carriage, whereby the plaintiff shipper was to load, unload, reload, feed, water, tend, and care for the sheep at his own expense and risk during the entire transportation, and further alleges that any injuries suffered by the sheep were due to the careless-

ness of the plaintiff in and about such matters, and notwithstanding that proper facilities were provided by the defendant. It is not perceived why such an agreement would not be valid as between the shipper and the railroad company. Its terms do not contravene the provisions of Act June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1911, p. 1341), known as the "Twenty-Eight Hour Law," since that act in terms provides that the owner of the animals shall primarily be charged with feeding and watering them. While such a provision would not afford any defense to a prosecution by the government for failure of the railroad company, upon the owner's default, it is, as between the owner and the railroad, a sufficient defense, since it is tantamount to an allegation that railroad company was not itself negligent, but that the negligence was that of the owner of the animals in and about a matter as to which such owner had contracted to assume the sole responsibility. Mo. Pac. Ry. Co.

vs. Tex. & Pac. Co. (C. C.) 41 Fed. 913."

369 Under this authority and under the pleadings and evidence in this case we respectfully submit that the Court of Civil Appeals erred in failing to sustain appellants' fifth assignment of error.

In the Court's decision the Court evidently takes the position that the entire initial contract issued by the Santa Fe lines at Watrous, New Mexico, was waived and that the appellants were estopped from pleading any provision in the initial contract and considering the question of whether or not the shipper and his agent owed the duty to water, feed, and rest the stock while in transit, the Court proceeded on the theory that the Texas & Pacific Ry. Co. contract executed at El Paso was in force and effect. The Court in its opinion says: "The evidence shows that the Texas & Pacific Railway Company undertook to feed, water, and rest the horses at Big Spring, notwithstanding the stipulation of the contract that the shipper should attend to such feeding and watering. In other words, that the Texas & Pacific Railway Company thereby waived any benefit it might have had under the stipulation in its contract of shipment that the shipper should feed and water the same in so far as it related to the feeding and watering of the same at that station." Replying to this we desire to point out to this Court that the provision in the initial contract provided that in event the railroad furnished laborers to assist in loading, unloading, reloading, feeding, watering, resting, while in transit, that it was agreed by and between the shipper and the railway company that such laborers would be considered as employees of the shipper and under the shipper's control. This being true the Court has erred in determining this assignment of error. And again in its opinion this Court says: "as the uncontradicted evidence showed that after leaving Big Spring the Texas & Pacific Railway Company did not confine the horses in the

370 car without feed and water for more than twenty hours and fifteen minutes and as no issue of negligence on the part of the Texas & Pacific Railway Company in confining the horses in the car without feed and water after leaving Big Spring was submitted to the jury in the Court's charge and no evidence to show any dam-

age to the horses by reason thereof is pointed out, the fifth assignment of error complaining of the refusal of requested instruction No. 5 is over-ruled." In reply to this, we desire to point out to the Court that appellee alleged that the Texas & Pacific Railway Company was negligent in that it kept the horses confined in the cars between Big Springs and Waco, Texas, without feed and water, and the evidence showed that the horses were without feed and water for twenty hours and fifteen minutes while being handled by the Texas & Pacific Railway Company, and the evidence further showed, notwithstanding the statement of this Court, in its opinion, that the horses were damaged by reason of being confined in the cars without food and water between Big Spring and Waco. See S. F. page 30 lines 6 to 8. The witness Fred Crowder, shipper's agent who accompanied the horses testified: "They were injured and damaged to some extent by reason of the fact that they were without food and water between Big Spring and Waco, Texas."

The Special Charge No. 5 being a correct presentation of the law, the court should have given same to the jury. It does not matter that the main charge of the court did not submit to the jury the question of negligence of the Texas & Pacific Railway Company in failing to feed, water, and rest the horses while in Transit. The pleadings of the appellee had made the issue and the evidence had sustained it and the Texas & Pacific Railway Company was entitled to have the jury instructed with reference to same. Therefore we say that the Court of Civil Appeals erred in over-ruling appellants' fifth assignment of error.

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III.

The *the* construction of the initial contract executed at Watrous, New Mexico, by the Santa Fe lines and providing for through transportation of appellee's horses from Watrous, New Mexico, to Waco, Texas, involves a Federal question and the said initial contract and the provisions of same having been pleaded by appellants and appellee having pleaded that the appellants were estopped from claiming any benefits under only one of the provisions in the initial contract to wit: The provision requiring suit to be brought within six months after loss or damage occurred, and there being no pleading of appellee charging that appellants were estopped from asserting the entire initial contract or any other provisions of same, except the six months' clause as aforesaid, the Court of Civil Appeals erred in overruling appellants' fourth assignment of error and the proposition thereunder for the reason that even though the plea of estoppel had been asserted against appellants' reliance on the six months' provision in the initial contract, yet it was a jury question for the jury to pass upon as to whether or not appellee relied upon any of the actions of the appellants and this was not submitted to the jury but the court simply assumed that the appellants were estopped from asserting said provisions, and for the further reason that all other parts of the initial contract save and except the six months' provision clause were valid and were binding, no plea of estoppel having been

asserted by appellee against the other provisions of said initial contract.

IV.

The construction of the initial contract executed at Watrous, New Mexico, and calling for the through transportation of appellee's horses from Watrous, New Mexico, to Waco, Texas, involves
 372 a Federal question and the Court of Civil Appeals erred in overruling appellee's sixth assignment of error for the reason that appellants had pleaded a certain provision in the initial contract, as aforesaid, to which appellee did not urge the plea of estoppel and a correct charge having been offered by appellants covering the issue as pleaded and the evidence covering same, the Court should have sustained same.

V.

The construction of the initial contract executed at Watrous, New Mexico, by the Santa Fe lines and appellee himself covering the through transportation of appellee's horses from Watrous, New Mexico, to Waco, Texas, is a Federal question and the Court of Civil Appeals erred in over-ruling appellants' seventh assignment of error and the proposition thereunder in that appellants had pleaded a certain provision in the initial contract to the effect that it was appellee's duty to load, unload, feed, water, and rest the horses while in transit and if the horses suffered any damage by reason of their failure to have feed, water, and rest while in transit, it was due to the failure of appellee to live up to his agreement as contained in said initial contract. Appellee having failed to plead that the appellants were estopped from claiming benefits of said provision of said initial contract and only attacking it on the ground that it was without consideration and that it was the duty of the appellants to feed and water the stock while in transit, and that appellants had failed to provide facilities for feeding and watering the stock while in transit, even though appellants' special charges Nos. 5 and 6 presenting said issues raised by the pleadings and evidence were incorrect, yet appellants having excepted to the court's main charge
 373 because of its failure to charge said issues, and appellants having excepted to the action of the court in refusing to give appellants' special charges Nos. five and six, it was the duty of the Court to prepare and give to the jury a correct charge covering said issues.

VI.

The construction of a bill of lading issued by one of the connecting carriers on an interstate trip is governed by the laws of the United States regulating interstate commerce, and therefore presents a Federal question. Even though the initial contract issued by the Santa Fe lines at Watrous, New Mexico, is not binding under the circumstances of this case and the subsequent contract made by the

Texas & Pacific Railway Company at El Paso is the contract governing this shipment while being *being* handled by the Texas & Pacific Railway Company, still said contract would be governed by the laws of the United States regulating interstate commerce and the court should have granted appellants' special instruction No. 5 asking that the question as to the shipper's negligence in failing to feed, water, rest, load, unload, and reload his stock while in transit be submitted to the jury, this duty having been pleaded by appellants as one of the provisions of the contract issued by the Texas & Pacific Railway Company. The Court therefore erred in over-ruling appellants' fifth assignment of error and the proposition thereunder.

VII.

The construction of a bill of lading issued by one of the connecting carriers on an interstate trip is governed by the laws of the United States regulating interstate commerce, and therefore presents a Federal question. Even though the initial contract issued by the Santa Fe lines at Watrous, New Mexico, is not binding under 374 the circumstances of this case and the subsequent contract made by the Texas & Pacific Railway Company at El Paso is the contract governing this shipment while being handled by the Texas & Pacific Railway Company, still said contract would be governed by the laws of the United States regulating interstate commerce and the Court should have granted appellants' special requested instruction No. 6, asking that the question as to the shipper's negligence in failing to feed, water, rest, load, unload, and reload his stock while in transit be submitted to the jury, this duty having been pleaded by appellants as one of the provisions of the contract issued by the Texas & Pacific Railway Company. The Court therefore erred in over-ruling appellants' sixth assignment of error and the proposition thereunder.

VIII.

The Court erred in over-ruling appellants' first assignment of error.

IX.

The Court erred in over-ruling and not sustaining the appellants' first assignment of error, the same being paragraph 7 of appellants' amended Motion for New Trial (Tr. p. 86) and the proposition thereunder found at page 5 of appellants' brief.

X.

The Court erred in over-ruling and in not sustaining appellants' second assignment of error.

XI.

The Court erred in over-ruling and not sustaining appellants' second assignment of error, the same being paragraph 18 of ap-

375 appellants' amended motion for a new trial (Tr. pages 93 and 94) and the proposition thereunder found in appellants' brief on pages 30 and 31.

XII.

The Court erred in over-ruling appellants' third assignment of error.

XIII.

The Court erred in over-ruling and not sustaining appellants' third assignment of error, the same being paragraph 24 of appellants' amended motion for new trial, (Tr. p. 97) and the proposition thereunder found in appellants' brief at — 31 thereof.

XIV.

The Court erred in over-ruling appellants' fourth assignment of error.

XV.

The Court erred in over-ruling and not sustaining appellants' fourth assignment of error, the same being paragraph 11 of appellants' amended motion for new trial, (Tr. p. 89) and the proposition thereunder found in appellants' brief at page 44 thereof.

XVI.

The Court erred in over-ruling appellants' fifth assignment of error.

XVII.

376 The Court erred in over-ruling and not sustaining appellants' fifth assignment of error, the same being paragraph 43 of appellants' amended motion for new trial, (Tr. p. 108 and 109) and the proposition thereunder found in appellants' brief at page 49 thereof.

XVIII.

The Court erred in over-ruling appellants' sixth assignment of error.

XIX.

The Court erred in over-ruling and not sustaining appellants' sixth assignment of error, the same being paragraph 44 of appellants' amended motion for new trial, (Tr. p. 109) and the proposition thereunder found in appellants' brief at page 49 thereof.

XX.

The Court erred in over-ruling appellants' seventh assignment of error.

XXI.

The Court erred in over-ruling and not sustaining appellants' seventh assignment of error, the same being paragraph 39 of appellants' amended motion for new trial, (Tr. pp. 106 and 107) and the proposition thereunder found in appellants' brief at pages 72 and 73 thereof.

XXII.

The Court erred in over-ruling appellants' eighth assignment of error.

XXIII.

The Court erred in over-ruling and not sustaining appellants' eighth assignment of error, the same being paragraph 50 of appellants' amended motion for new trial, (Tr. pp. 113, 114, and 115) and the proposition thereunder found in appellants' brief at pages 77 and 78 thereof.

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XXIV.

The Court erred in over-ruling appellants' ninth assignment of error.

XXV.

The Court erred in over-ruling and not sustaining appellants' ninth assignment of error, the same being paragraph 23 of appellants' amended motion for new trial, (Tr. pp. 96 and 97) and the proposition thereunder found in appellants' brief at pages 86 and 87 thereof.

XXVI.

The Court erred in over-ruling appellants' tenth assignment of error.

XXVII.

The Court erred in over-ruling and not sustaining appellants' tenth assignment of error, the same being paragraph 25 of appellants' amended motion for new trial, (Tr. p. 98) and the proposition thereunder found in appellants' brief at pages 87 and 88 thereof.

XXVIII.

The Court erred in over-ruling appellants' eleventh assignment of error.

XXIX.

The Court erred in over-ruling and not sustaining appellants' eleventh assignment of error, the same being paragraph 27 of appellants' amended motion for new trial, (Tr. pp. 98 and 99) and the proposition thereunder found in appellants' brief at pages 95 and 97 thereof.

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XXX.

The Court erred in overruling appellants' twelfth assignment of error.

XXXI.

The Court erred in overruling and not sustaining appellants' twelfth assignment of error, the same being paragraph 28 of appellants' amended motion for new trial, (Tr. pp. 99 and 100) and the proposition thereunder found in appellants' brief at pages 96 and 97 thereof.

XXXII.

The Court erred in overruling appellants' thirteenth assignment of error.

XXXIII.

The Court erred in overruling and not sustaining appellants' thirteenth assignment of error, the same being paragraph 20 of appellants' amended motion for new trial, (Tr. p. 95) and the proposition thereunder found in appellants' brief at pages 106 and 107 thereof.

XXXIV.

The Court erred in overruling appellants' fourteenth assignment of error.

XXXV.

The Court erred in overruling and not sustaining appellants' fourteenth assignment of error, the same being paragraph 56 of appellants' amended motion for new trial, (Tr. pp. 117 and 118 and 119), the proposition thereunder found in appellants' brief at pages 115 and 116 thereof.

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XXXVI.

The Court of Civil Appeals erred in that part of its opinion in which it says that: "If in the court's charge, undue emphasis was given to the various issues of negligence as complained of in several assignments of error, it is reasonably clear under the evidence

noted already that such error did not result in probable harm to appellants and the safe observation is applicable to the further assignment in which complaint was made of alleged improper argument by plaintiff's counsel. Rule 62 A." In other words, the Court of Civil Appeals holds that even though appellants' second, third, and eighth assignments of error correctly present the law and should be sustained, yet it is reasonably clear under the evidence that the error complained of in the second, third, and eighth assignments of error did not result in probable harm to appellants.

XXXVII.

The Court of Civil Appeals erred in that part of its opinion in which it stated: "It is also clear that appellants having refused to handle the shipment under the original contract executed by the original carrier and having required the shipper to execute with them a separate and independent contract applying to its own lines within the state, are estopped from now invoking any benefits under said original contract and hence all assignments predicated upon the provisions of the original contract and on the law applicable thereto are overruled, "for the reason that appellee only pleaded the doctrine of estoppel with reference to the provisions of the initial contract with reference to filing suit within six months and appellee having failed to plead estoppel with reference to the other provisions of said initial contract, appellee was not entitled to have the doctrine of estoppel applied to the other provisions in said initial contract, and the Court of Civil Appeals therefore erred in holding that all the provisions of the original contract could not inure as they were estopped from invoking same.

XXXVIII.

Even though the contract issued by the Santa Fe Lines at Watrous, New Mexico, and its provisions cannot be invoked by appellants and even though the liability of appellant, Texas & Pacific Railway Company is measured by the terms of its contract executed at El Paso, Texas, still the shipment of horses being interstate the contract executed by the Texas & Pacific Railway Company at El Paso would be governed by the laws of the United States, and a provision of said contract having been pleaded by appellant, T. & P. Ry. Co., to the effect that it was the duty of shipper's agent who accompanied plaintiff's horses to load, unload, reload, feed, water, and rest them while in transit and that if plaintiff's horses were damaged by failure to receive such attention, the railway company would not be liable therefor; and evidence having been introduced concerning this issue, even though appellants' special charges Nos. 5 and 6 were incorrect in any particular, still appellants having excepted to the Court's main charge for its failure to contain a charge upon this issue and having excepted to the refusal of the Court to give its special charges Nos. 5 and 6, and said special charges Nos. 5 and 6 being sufficient to call the atten-

tion of the court to the omission of the Court to charge upon said issue in his main charge, the court should have prepared a correct charge upon said issue as presented by the pleadings and evidence, and therefore the Court of Civil Appeals erred in overruling appellants' 7th assignment of error and the proposition there-
381 under, this defendant asserting that the provisions of the T. & P. contract executed at El Paso presents a Federal question.

XXXIX.

The construction of the initial contract executed by the Santa Fe lines at Watrous, N. M. and governing appellee's shipment from Watrous, N. M. to Waco, Texas, presents a Federal question. Appellants having asserted and claimed the benefit of a provision in the initial contract requiring suit to be brought within six months after loss or damage occurred and appellee's failure to so bring his suit, even though appellee pleaded that appellants were estopped from asserting the benefits of said initial contract executed at Watrous, N. M., by reason of the fact that when appellee's horses reached El Paso, Texas, the Texas & Pacific Railway Company refused to carry said horses on its line under the initial contract and demanded the execution of a new contract from El Paso to Fort Worth and likewise the Missouri, Kansas & Texas Railway Company of Texas demanded a new contract between Fort Worth, Texas, and Waco, Texas, still before said plea of estoppel would be available to appellee it was necessary for the jury to determine whether or not appellee relied upon the actions of appellants in refusing to recognize the initial contract thereby suffering damage. Therefore the Court of Civil Appeals erred in overruling appellants' fourth assignment of error, which complains of the trial court's error in assuming that the initial contract and its provisions could not be invoked because appellants would be estopped from claiming the benefits under said initial contract.

Appellants show to the Court that Messrs. Templeton & Milam are attorneys of record for appellee herein and further show
382 to the Court that they have filed in this Court a true and correct copy of this motion for rehearing to be served upon said Messrs. Templeton & Milam, attorneys of record of appellee, B. Leatherwood.

Wherefore appellants pray this Honorable Court to grant appellants a rehearing hereof and respectfully pray the Court to set aside the judgment rendered herein on February 24th, 1917, affirming this case, and to reverse and render same or else reverse and rmand this case as prayed for herein, or reverse and reform same.

Respectfully submitted,

THOMPSON, BARWISE & WHARTON,
GEO. THOMPSON, JR.,

*Attorneys for Appellants, Texas & Pacific
Railway Company and the Missouri,
Kansas & Texas Ry. Company of Texas.*

383 THE STATE OF TEXAS,
County of Tarrant:

I, J. A. Scott, Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas, hereby certify that the above and foregoing instrument in writing of seventy pages contain a true and correct copy of Appellants' motion for rehearing as the same appears on file in this office in cause No. 8517. Texas & Pacific Railway Company et al. vs. B. Leatherwood from the county court of Tarrant County.

Given under my hand and the seal of said court on this the 12th day of July, A. D. 1917.

[Seal Court of Civil Appeals of the State of Texas.]

J. A. SCOTT, *Clerk*.

384 In the Court of Civil Appeals of the Second Supreme Judicial District of Texas, at Fort Worth.

No. 8517.

TEXAS & PACIFIC RAILWAY COMPANY and MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Appellants,

VS.

B. LEATHERWOOD, Appellee.

Reply to Appellants' Motion for a Rehearing.

To said Honorable Court:

The burden of Appellants' complaint appears to be that this Honorable Court erred in overruling their contention to the effect:

1. That the paper introduced in evidence which is denominated the contract, made with the initial carrier, which was signed at Watrous, New Mexico, by that carrier and the shipper thereby became, not only a valid contract, binding alike on both of the parties thereto but on all succeeding carriers as well, and more, that such contract once it was thus executed, became irrevocable, and had all the force and effect of a statute duly enacted by the governing legislative body, or of an order of the Interstate Commerce Commission duly promulgated; and further that none of the provisions of such contract could be waived, modified or evaded.

385 by either or all of the carriers either with or without consent of the shipper.

2. Wherefore, it is contended: (a) That all subsequent contracts between the shipper and succeeding carriers were without consideration and void, and (b) that neither such void contracts nor appellants' refusal to accept and carry appellee's stock under the original

contract will estop appellants from claiming the benefits of that contract which they refused to recognize.

3. That the so-called original contract by the admissions and statements therein contained proved as a matter of law that all preliminary steps necessary to its validity as a contract had been duly taken, and that the trial court should have so assumed and instructed the jury to return a verdict for the defendants.

The successful maintenance of these contentions will eliminate the element of contract from such transactions and will automatically make applicable to the particular shipment all of the stipulations and provisions contained in the form of contract, on which the rate under which the freight moves, is based; and this though the shipper never saw or signed the so-called contract and had no information as to what its provisions and stipulations were. This is true because, if the rate changed and paid is based on that form of contract, its provisions must be upheld, not because the shipper assented thereto but because he accepted the rate applicable thereto. To hold otherwise would, according to Appellants' contention, amount to discrimination such as is prohibited by law.

A further result of upholding that contention will be to hold, as a matter of law, that the provisions of that form of contract are reasonable, regardless of the facts of the particular case, simply because the contract so provides.

Appellants further contend that because the United States Supreme Court held in the Harriman case that a certain provision of
386 a similar contract was reasonable and that the trial court should so hold as a matter of law, the State courts should so change their procedure as to withdraw from the jury the consideration of the reasonableness of such provisions and declare same reasonable as a matter of law. To sustain such contention and follow same to its logical conclusion will result in throwing into the discard our own rules of procedure in our State courts and make them but little better than an echo of our National courts even in matters of procedure. That the State courts in matters of procedure are not controlled by the decisions of the Federal courts is well settled.

York vs. Texas, 137 U. S. 15-21. 34 L. Ed. 604-605.

Mex.-Cent. Ry. Co. vs. Pinkney, 149 U. S. 194-210: 37 L. Ed. 702-703.

Hence the reasonableness or no, of such stipulations in such contracts may be tried and determined in the federal courts as a question of law, and in the State courts as a question of fact. We, therefore, contend that the decisions of the federal tribunals on questions of procedure are not binding on the State courts in such matters.

So. Pac. Ry. Co. vs. Allen, 443, 444.

W. U. Tel. Co. vs. Piper, 191 S. W. 822-825.

The same observations apply to appellants' contention, that the stipulation in the several contracts of both the initial and succeeding carriers, relative to the feeding and watering of the stock while in transit, cannot be waived by any action or conduct of any of the car-

riers. Pushed to its logical conclusion, the maintenance of this contention would preclude the plaintiff from recovering damage occasioned by his failure to properly feed and water the stock while in transit, even though such failure was caused by the action of the carriers in forcibly taking possession of the stock and feeding and watering them when and where they say proper and in denying him the opportunity to do so. All this because the contracts stipulate that he should feed and water them, and the carriers are powerless to

relieve him of this duty. The statement of such a proposition
387 is sufficient to refute it. We do not understand that any such extreme rulings are required by any of the authorities cited by Appellants. Most of these cases are ably reviewed by the Court of Appeals of Kentucky in the recent case of B. & O. Ry. Co. vs. Leach, 191 S. W. 310-314. In this case the Appellant made the same contention which the Appellants make in the instant case. After an exhaustive review of the authorities, that court held adversely to such contention, and held that such stipulations in such contracts could be waived, citing numerous authorities in support of the holding. To the same effect was the holding of the same court in re Howard and Callahan vs. S. C. Ry. Co., 171 S. W. 442, and Cincinnati, etc., Ry. Co. vs. Smith and Johnson, 176 S. W. 1013, 1016. Some of the questions which we are considering, were considered by this Honorable Court in the well considered case of W. U. Tel. Co. vs. Piper, reported in 191 S. W. 817, and again the holding was adverse to Appellants' contention.

Replying to Appellants' contention that the plaintiff did not plead estoppel as against the provision of the contract made with the initial carrier requiring plaintiff to feed and water his stock while in transit, we submit that the record shows:

1. That the plaintiff's plea of estoppel went to that entire contract and to each and all of its provisions. (Tr. 40, 41, 42, 43, 44, 45, 46.)
2. That the provision in question was substantially the same in each and all of the contracts. (Tr. 23 to 25, 27, 28, 29.)
3. That it was agreed that Appellants refused to receive and carry the stock under the contract made with the initial carrier and required the execution of new contracts under which they moved over Appellants' lines (S. F. page 40). This agreement was voluntarily made by appellants' counsel and no objection was urged
388 thereto on the ground that there was no pleading to support the fact thus admitted. In this state of the record, the contention that there was no pleading to warrant the admission of evidence of estoppel is without merit.

Ward vs. Wilson, 43 S. W. 833.

Same case, Sup. Ct., 45 S. W. 8.

Rule 62-2.

We respectfully submit that the motion for a rehearing should be overruled, and we so pray.

TEMPLETON & MILAM,
C. A. WRIGHT,
Attorneys for Appellee.

THE STATE OF TEXAS,
County of Tarrant:

I, J. A. Scott, Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas, hereby certify that the above and foregoing instrument in writing contains a true and correct copy of the reply of Appellee to Appellants' motion for rehearing as the same appears in cause No. 8517. Texas & Pacific Railway Company et al. vs. B. Leatherwood, from the County Court of Tarrant County, now on file in this office.

Given under my hand and the seal of said court on this the 12th day of July, A. D. 1917.

[Seal Court of Civil Appeals of the State of Texas.]

J. A. SCOTT, Clerk.

389 [Endorsed:] No. 8517. Texas & Pacific Railway Company and Missouri, Kansas and Texas Railway Company of Texas, Appellants, vs. B. Leatherwood, Appellee.

Reply to Appellants' Motion for Rehearing.

Filed in Court of Civil Appeals for Second Supreme Judicial District of Texas. Mar. 15, 1917: J. A. Scott, Clerk.

390 In the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth.

No. 8517.

TEXAS & PACIFIC RAILWAY COMPANY and MISSOURI, KANSAS & TEXAS RAILWAY COMPANY OF TEXAS, Appellants,

vs.

B. LEATHERWOOD, Appellee.

Appealed from the County Court of Tarrant County, Texas, for Civil Cases.

Appellants' Motion to Certify Question to the Supreme Court of Texas.

Comes now the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway Company of Texas, appellants in the above numbered and entitled cause and file this their motion requesting the Court to certify a vital and material question involved in this case to the Supreme Court of Texas and to hold in abeyance any action upon their motion for rehearing, heretofore filed in this

391 cause, and which has not yet been acted upon and for cause shows to the Court:

I.

That this Court on the 24th day of February, 1917, affirmed this cause wherein plaintiff, B. Leatherwood, recovered a judgment against appellants, Texas & Pacific Railway Company and Missouri, Kansas & Texas Railway Company of Texas, in the County Court of Tarrant County, Texas, for Civil Cases.

II.

That heretofore on the 10th day of March, A. D. 1917, appellants duly filed herein their Motion for Rehearing, which has not as yet been acted upon by this Court.

III.

Appellants further show that the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas in affirming this case is final in so far as the Courts of Texas are concerned.

IV.

Appellants further show to the Court that the material and vital question involved in this cause which appellants say should be certified to the Supreme Court of Texas is as follows:

Where a shipment of horses moved from Watrous, New Mexico, to Waco, Texas, and the shipper of said horses and the initial carrier of the shipment towit; Santa Fe Railway Company Lines, entered into a contract on October 9th, 1913, for the through transportation of said horses to Waco, Texas, said horses to be transported by the initial carrier towit; the Santa Fe Lines from Watrous, New Mexico, to El Paso, Texas, and there delivered to the connecting carrier, the Texas & Pacific Railway Company, to be transported by it
392 from El Paso, Texas, to Fort Worth, Texas, and there delivered to the connecting carrier, the Missouri, Kansas & Texas Railway Company of Texas, to be carried by it from Fort Worth, Texas, to Waco, Texas,—could shipper or his agent and the connecting carriers waive the initial contract entered into at Watrous, New Mexico, and enter into new contracts of carriage covering the transportation of the horses over the Texas & Pacific Railway Company's lines between El Paso, Texas, and Fort Worth, Texas, and over the Missouri, Kansas & Texas Railway Company of Texas' lines between Fort Worth, Texas, and Waco, Texas, which contracts would be valid and binding upon the parties thereto and not contrary to the law of the United States governing said shipment, same being interstate?

V.

Appellants show to the Court that the Court of Civil Appeals for the Seventh Supreme Judicial District of Texas at Amarillo, Texas,

in the case of A. T. & S. F. Ry. Co. vs. Word, 159 S. W. 375 held in the negative with respect to said question set out in the preceding paragraph for in discussing a similar question the Court said:

"If the Fort Worth & Denver City Railway Company was a principal in making the contract for the through shipment and received the consideration therefor, the act of the Santa Fe procuring a contract for such shipment over the same route was, we think, without consideration and contrary to law. It was but the agent of the Denver Road and under the law was charged with the duty of carrying out the contract of its principal without right or power to engraft
393 new conditions and stipulations on the contract already lawfully executed binding it fully to perform its part of the contract of carriage under the terms of said contract."

Appellants further show to the Court that the Court of Civil Appeals for the — Judicial District of Texas at Austin, Texas, likewise, in the case of M. K. & T. — T. vs. Ward, 169 S. W. 1035, held in the negative with respect to the question outlined in the preceding paragraph concurring in the opinion of the Amarillo Court of Civil Appeals in the A. T. & S. F. vs. Word case. In the Ward case the Austin Court of Civil Appeals in discussing the case said:

"The trial court did not commit any error in holding that the appellants were bound by such initial contract and that the contract and stipulations executed and set up by appellants as the defense in this case was an act and attempt to exempt and avoid carrier liability and was in direct violation of Section 20 of the Interstate Commerce Act, generally referred to as the Carmack Amendment."

This Honorable Court of Civil Appeals for the Second Supreme Judicial District of Texas in affirming this case has in effect held in the affirmative with respect to the question set out in paragraph IV hereof and the judgment of this Court upon such question is in direct conflict with the opinions of the Courts of Civil Appeals at Amarillo and Austin.

Appellants further show that under the Revised Statutes of the State of Texas that it is provided that where two courts of Civil

394 Appeals of Texas differ upon questions of law, that it is the duty of the Court of Civil Appeals to certify to the Supreme Court of Texas the question in issue.

Appellants further show to the Court that under the recent holding in the case of Warren vs. Wilson, 192 S. W. 528, (Advance Sheet S. W. R. March 28th, 1917, opinion by Chief Justice Phillips) that this Court should certify the question presented to the Supreme Court of Texas even though this is a case where the judgment of the Court of Civil Appeals is final.

Wherefore appellants pray that this Honorable Court of Civil Appeals for the Second Supreme Judicial District of Texas withhold action upon appellants' Motion for Re-hearing filed herein and that this Court certify to the Supreme Court of Texas the question presented herein and that when said question has been answered by the

Supreme Court of Texas that this Honorable Court proceed to act upon appellant's Motion for Re-hearing heretofore filed herein.

THOMPSON, BARWISE & WHARTON,
 GEORGE THOMPSON, JR.,
*Attorneys for Appellants Texas & Pacific Rail-
 way Company and Missouri, Kansas & Texas
 Railway Company of Texas.*

Appellants show that Templeton & Milam, attorneys at Fort Worth, Texas, are attorneys of record for appellee, and pray that a copy of this motion be served upon them.

THOMPSON, BARWISE & WHARTON AND
 GEORGE THOMPSON, JR.,
Attorneys for Appellants.

395 THE STATE OF TEXAS,
County of Tarrant:

I, J. A. Scott, Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas hereby certify that the above and foregoing five pages of writing contain a true and correct copy of Appellants' motion to certify question to the Supreme Court of Texas, now on file in this office in cause No. 8517, Texas & Pacific Railway Company et al. vs. B. Leatherwood, from the county court of Tarrant County.

Given under my hand and the seal of said court on this the 12th day of July, A. D. 1917.

[Seal Court of Civil Appeals of the State of Texas.]

J. A. SCOTT, *Clerk.*

396

No. 8517.

TEXAS & PACIFIC RY. Co. et al., Appellants,

v.

B. LEATHERWOOD, Appellee.

From the County Court of Tarrant County.

Conclusions.

The evidence offered by the plaintiff in the court below would have warranted an award of damages more than three times the amount allowed by the jury. That evidence is cited by appellee in his brief in support of the judgment and appellants have cited no evidence to the contrary, nor have they presented any assignment of error challenging the verdict on the ground of excessiveness of damages allowed.

If in the court's charge undue emphasis was given to the various

issues of negligence, as complained of in several of the assignments of error, it is reasonably clear under the evidence noted already that such error did not result in any probable harm to appellants, and the same observation is applicable to the further assignment in which complaint was made of alleged improper argument by plaintiff's counsel. Rule 62a, 149 S. W. X.

It is also clear that appellants having refused to handle the shipment under the original contract executed by the initial carrier in Watrous, New Mexico, and having required the shipper to execute with each of them its separate and independent contract applying only to its own lines within the State, are estopped from now
397 invoking any benefits under said original contract and, hence, all assignments predicated upon the provisions of the original contract and of the law applicable thereto are overruled.

The evidence shows without controversy that the Texas & Pacific Railway Company undertook to feed, water and rest the horses at Big Spring, notwithstanding the stipulation in the contract that the shipper should attend to such feeding and watering; in other words, that the Texas & Pacific Railway Company thereby waived any benefit to it of the stipulation in its contract of shipment that the shipper should feed and water the same, so far as related to the question of feeding and watering at that station.

As the uncontradicted evidence showed that after leaving Big Spring, the Texas & Pacific Railway Company did not confine the horses in the car without feed and water for more than twenty hours and fifteen minutes, and as no issue of negligence on the part of the Texas & Pacific Railway Company in confining the horses in the car without feed and water after leaving Big Spring was submitted to the jury in the court's charge, and no evidence to show any damage to the horses by reason thereof is pointed out, the fifth and sixth assignments of error complaining of the refusal of requested instructions Nos. 5 and 6 are overruled.

The contention made in the ninth and tenth assignments of error that there was no evidence to warrant the submission of the
398 issues of negligence therein referred to is not sustained by the record which shows evidence to the contrary.

The record shows without controversy that after the horses left Big Spring they were confined in the car without feed, water, or rest for more than 28 hours, and the court did not err in his charge in assuming that as a fact, as complained of in the eleventh assignment of error.

The plaintiff's pleadings having specifically alleged that the M. K. & T. Railway Company confined the horses in the car without feed and water for more than 43 hours, the twelfth assignment is overruled.

We think the plaintiff's pleadings were sufficient to raise the issue of negligence in undertaking to ship the horses in an unsafe car, contrary to the contention presented in the thirteenth assignment of error.

In order to hold the Texas & Pacific Railway Company liable, it was a part of plaintiff's case to show the condition of the horses at

the time they were delivered to that Company at El Paso. The depositions of the employees of the initial carrier were competent evidence to establish that fact, and as plaintiff's allegation of the condition of the horses when they were delivered to the Texas & Pacific Railway Company was put in issue by that Company, it is in no position to complain that the cost of taking those depositions, which were used by the plaintiff to make out his case against the Texas & Pacific Railway Company, should not be taxed against it, especially as some portions of the depositions which were not
399 offered by the plaintiff were offered by appellants themselves. Furthermore, the appellants failed to point out any proof with respect to the amount of such costs, while appellee in his brief asserts that the record is entirely silent upon that issue, and appellants do not controvert that statement. It thus appears that the question whether or not the error in taxing the costs against appellants amounted to such harm as to require a reversal of the judgment is left wholly to conjecture. Hence, appellants' fourteenth assignment is overruled.

For the reasons indicated the judgment is affirmed.

Filed, February 24, 1917.

(Not for publication.)

IRBY DUNKLIN,
Associate Justice.

400-01 THE STATE OF TEXAS,
County of Tarrant:

I, J. A. Scott, Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas, hereby certify that the above and foregoing instrument in writing is a true and correct copy of the conclusions of this court filed on the 24th day of February, A. D. 1917, in the above styled and numbered cause.

Given under my hand and the seal of said court on this the 12th day of July, A. D. 1917.

[Seal Court of Civil Appeals of the State of Texas.]

J. A. SCOTT, *Clerk.*

402 From County Court of Tarrant County.

No. 8517.

TEXAS & PACIFIC RY. Co. et al.

vs.

B. LEATHERWOOD.

Opinion by Mr. Dunklin, A. J.

February 24, 1917.

This cause came on to be heard on the transcript of the record, and the same being inspected, it is the opinion of the court that

there was no error in the judgment it is therefore, considered adjudged and ordered that the judgment of the court below be in all things affirmed as per conclusions filed; that the appellee B. Leatherwood, do have and recover of and from the appellant, Missouri, Kansas & Texas Railway Company of Texas and its sureties on its supersedeas bond, C. C. Huff and John N. Simpson the amount adjudged below for which let execution issue; It is further ordered that the appellee, B. Leatherwood, do have and recover of and from the appellant, Texas & Pacific Railway Company, and its sureties, on its supersedeas bond, R. H. Stewart and E. R. Sidney the amount adjudged below against it for which let execution issue. It is further ordered that the appellants, Missouri, Kansas & Texas Railway Company of Texas and its sureties on its supersedeas bond, C. C. Huff and John N. Simpson, and Texas & Pacific Railway Company and its sureties on its supersedeas bond, R. H. Stewart and E. R. Sidney pay all costs in this behalf expended for which let execution issue, and that this decision be certified below for observance.

8214-8517.

TEXAS & PACIFIC RY. CO.

VS.

B. LEATHERWOOD.

June 2, 1917.

This day came on to be heard the motion by appellant for a rehearing in this cause and the same having been duly considered by the court is hereby overruled.

403

8236-8517.

TEXAS & PACIFIC RY. CO.

VS.

B. LEATHERWOOD.

June 2, 1917.

This day came on to be heard the motion by appellant to certify in this cause and the same having been duly considered by the court is hereby overruled.

THE STATE OF TEXAS,
County of Tarrant:

I, J. A. Scott, Clerk of the Court of Civil Appeals, hereby certify that the above and foregoing instrument in writing is a true and correct copy of all orders and judgments made and entered of record by this Court in the above styled and numbered cause.

Given under my hand and seal of office, on this the 12th day of July, A. D. 1917.

[Seal Court of Civil Appeals of the State of Texas.]

J. A. SCOTT, *Clerk.*

404

Clerk's Office,

Court of Civil Appeals at Fort Worth.

No. 8517.

TEXAS & PACIFIC RY. Co.

vs.

B. LEATHERWOOD.

Certified Copy Bill of Costs from Tarrant County.

| | | | |
|-------------------------|---------|--------------------------|----------|
| Filing Records | .50 | Transcript of Orders for | |
| Docketing cause | .50 | Application of Writ of | |
| Appearances | 1.00 | Error to Supreme | |
| Filing and Entering | | Court | |
| Motion (2) | .70 | Cost on Application for | |
| Orders | 3.00 | Writ of Error in Su- | |
| Filing Papers | 1.00 | preme Court | |
| Continuances | | Transcript Fee in Lower | |
| Judgment | 1.00 | Court | |
| Taxing Costs | .50 | Costs at Fort Worth.. | 24.90 |
| Mandate | 1.50 | Stenographer's Fee.... | |
| Recording Opinion ... | 1.00 | Express Charges | |
| Certified Copy of Bill | | Cert. Copy Transcript.. | 75.50 |
| of Costs | .70 | Transcript Paper | 3.00 |
| Certified Copy of Mo- | | | <hr/> |
| tion | 4.50 | | \$103.40 |
| Issuing — Writs | | Proofing S. of F., Mo. | |
| Issuing — Notices ... | 7.00 | for Rehearing & Mo- | |
| Execution for Costs and | | tion to Certify..... | 2.50 |
| Return | | Cert. True Copy to S. of | |
| Reverse Execution and | | F. | .50 |
| Return | | Cert. True Copy to Mo. | |
| Alias Execution and | | for Reh. | .50 |
| Return | | Cert. True Copy to Mo. | |
| Pluries Execution and | | to Certify | .50 |
| Return | | Cert. True Copy to Mo. | |
| Issuing Precepts | 1.00 | to Opinion | .50 |
| Sheriff's Fees | 1.00 | Trans. of Orders of | |
| | | Court | 1.00 |
| | | Cert. Copy Reply to Mo. | |
| | | for Reh. | 1.75 |
| Total | \$24.90 | | <hr/> |
| | | | \$110.65 |

I, James Scott, Clerk of the Court of Civil Appeals, Second Supreme Judicial District of Texas, at Fort Worth, hereby certify that the above copy of the original Bill of Costs is true and correct.

Witness my hand and seal of said Court at Fort Worth, this 9th day of July A. D., 1917.

[Seal Court of Civil Appeals of the State of Texas.]

J. A. SCOTT, *Clerk*.

[Endorsed:] No. 8517. Certified Copy Bill of Costs in the Court of Civil Appeals, Fort Worth, Texas.

Texas & Pacific Ry. Co., et al., vs. B. Leatherwood.

Issued 9th day of June 1917. J. A. Scott, Clerk.

405 THE STATE OF TEXAS,
County of Tarrant:

I, J. A. Scott, Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas, hereby certify that the above and foregoing pages contained herein contain a true and correct copy of the entire transcript of record of the case, including the proceedings of this court as the same appears on file in this office in cause No. 8517, Texas & Pacific Railway Company et al. vs. B. Leatherwood, from the county court of Tarrant County, Texas.

Given under my hand and the seal of said Court on this the 25th day of July, A. D. 1917.

[Seal Court of Civil Appeals of the State of Texas.]

J. A. SCOTT, *Clerk*.

[Endorsed:] Application. No. 8517. Second District.

Texas & Pacific Ry. Co. et al., Appellant-, vs. B. Leatherwood, Appellee.

From Tarrant County.

Certified Copy of Orders from the Court of Civil Appeals at Fort Worth.

Office Supreme Court U. S. Filed Aug. 18, 1917. James D. Maher, Clerk,

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Court of Civil Appeals, Second Supreme Judicial District of the State of Texas, Greeting:

Being informed that there is now pending before you a suit in which Texas & Pacific Railway Company and Missouri, Kansas & Texas Railway of Texas are appellants and B. Leatherwood is appellee, which suit was removed into the said Court of Civil Appeals by virtue of an appeal from the County Court of Tarrant County, State of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Court of Civil Appeals and removed into the Supreme Court of the United States, Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 26099. Supreme Court of the United States. No. 632, October Term, 1917. Texas & Pacific Railway Company et al. vs. B. Leatherwood. Writ of Certiorari.

File No. 26099.

In the Supreme Court of the United States.

No. 632, October Term, 1917.

TEXAS & PACIFIC R'Y COMPANY et al., Petitioners,

vs.

B. LEATHERWOOD, Respondent.

Whereas, a petition for writ of certiorari was granted by the Supreme Court of the United States on October 15th, 1917, and a writ of certiorari has been issued by James D. Maher, Clerk of said Court on the 18th day of October, 1917, directed to the Court of Civil Appeals for the Second Supreme Judicial District of the State of Texas, commanding said Court to send up to the Supreme Court the record and proceedings in the above cause.

Now, therefore, We, J. A. Templeton of the firm of Templeton

and Milam, Counsel for respondent, and George Thompson of the firm of Thompson, Barwise & Wharton, counsel for petitioners, agree that the certified transcript of record, now on file with the Clerk of the Supreme Court of the United States, may be taken as a return to the writ of certiorari so issued.

It is further understood by the undersigned that this agreement shall be filed with the Clerk of the Court of Civil Appeals for the Second Supreme Judicial District, and that he shall send a certified copy of same to the Honorable Clerk of the Supreme Court of the United States as his return to the writ of certiorari.

Witness our hands this the 22nd day of October, A. D., 1917.

J. A. TEMPLETON,
Counsel for Respondent.
GEORGE THOMPSON,
Counsel for Petitioners.

THE STATE OF TEXAS,
County of Tarrant:

I, J. A. Scott, Clerk of the Court of Civil Appeals in and for the Second Supreme Judicial District of Texas, hereby certify that the foregoing stipulation is a true and correct copy of the original stipulation on file in this court filed as of this date, and that this shall constitute my return to the writ of certiorari issued October 18th A. D. 1917.

Given under my hand and the seal of this court on the 22nd day of October, A. D. 1917.

[Seal Court of Civil Appeals of the State of Texas.]

J. A. SCOTT,
Clerk.

[Endorsed:] 632/26099.

[Endorsed:] File No. 26099. Supreme Court U. S., October Term, 1917. Term No. 632. Texas & Pacific Ry. Co. et al., Petitioners, vs. B. Leatherwood. Writ of certiorari and return. Filed November 6, 1917.

IN THE
SUPREME COURT OF THE UNITED STATES

TEXAS & PACIFIC RY. CO.

AND

MISSOURI, KANSAS & TEXAS
RAILWAY OF TEXAS,

PETITIONERS,

VS.

B. LEATHERWOOD,

RESPONDENT.

No. _____

Now come petitioners, who were appellants in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas, and move this Honorable Court, that it, either by Writ of Certiorari or other process, directed to the Honorable Judges of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas, require said Court to certify to this Court, for its review and determination, a certain cause in said Court of Civil Appeals lately pending, to-wit, No. 8517, wherein petitioners were appellants and B. Leatherwood appellee, and to that end, petitioners respectfully now tender their petition for such writ, together with a certified copy of the entire record in said cause, as same now appears in the said Court of Civil Appeals.

George Thompson
J. H. Barwise Jr.
Solicitors for Petitioners.

George Thompson
Of Counsel.

IN THE
SUPREME COURT OF THE UNITED STATES

TEXAS & PACIFIC RY. CO.

AND

MISSOURI, KANSAS & TEXAS
RAILWAY OF TEXAS,

PETITIONERS,

VS.

B. LEATHERWOOD,

RESPONDENT.

No. _____

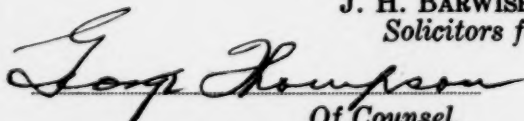
To the above named B. Leatherwood, Respondent:

The Respondent, B. Leatherwood, is hereby notified that on August 20th, 1917, during adjournment of the Supreme Court of the United States, pursuant to Rule 37, Section 4, of said Court, Petitioners will file thirty printed copies of their Petition for Writ of Certiorari, of their Brief containing the Argument thereon, attached hereto, and a Certified Copy of the entire transcript of record of the case, including the proceedings in the Court to which the Writ of Certiorari is asked to be directed.

GEORGE THOMPSON,

J. H. BARWISE, JR.,

Solicitors for Petitioners.


Of Counsel.

The foregoing notice is hereby accepted, and delivery of a copy of the attached motion, of the Petition for Writ of Certiorari, and of the Brief containing Argument thereon, is hereby acknowledged.

This the _____ day of _____, 1917.

Solicitors for Respondent.

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No. _____

IN THE
Supreme Court of the United States
October Term, 1917.

TEXAS & PACIFIC RAILWAY COMPANY
AND
MISSOURI, KANSAS & TEXAS RAILWAY
OF TEXAS,
Petitioners,
vs.
B. LEATHERWOOD,
Respondent.

THE PETITION OF THE TEXAS & PACIFIC RAILWAY COMPANY AND THE MISSOURI, KANSAS & TEXAS RAILWAY OF TEXAS, CORPORATIONS, FOR A WRIT OF CERTIORARI, TO BE DIRECTED TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, AT FORT WORTH, TEXAS, TO BRING BEFORE THIS HONORABLE COURT THE CASE No. 8517, THERE PENDING, ENTITLED TEXAS & PACIFIC RAILWAY COMPANY ET AL., APPELLANTS, vs. B. LEATHERWOOD, APPELLEE.

GEORGE THOMPSON,
J. H. BARWISE, JR.,
Counsel for Petitioners.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The following is a summary and short statement of the matters involved herein:

On March 2, 1915, B. Leatherwood filed suit in the County Court of Tarrant County, Texas, for Civil Cases, against the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway of Texas, for \$520 for alleged damages to a shipment of horses made by him from Watrous, New Mexico, to Waco, Texas, on or about October 9, 1913, over the lines of railway of the Santa Fe, of the Texas & Pacific Railway Company and of the Missouri, Kansas & Texas Railway of Texas; the first named carrier, the Santa Fe Railway Company, being dismissed from the suit at the time of the trial.

Respondent herein alleged rough handling, delay, and failure of Petitioners to feed, water and rest the horses in transit. (Tr. pp. 10-16). The Petitioners defended, pleading as a bar to Respondents' right of recovery the failure of Respondent to comply with a provision in the bill of lading issued by the initial carrier, the Santa Fe Railway Company, governed by the laws of the United States regulating interstate commerce, signed by Respondent, to the effect that any suit for loss or damage to the shipment of horses covered by the bill of lading should be brought within six months after same occurred, else said suit would be barred; (Tr. pp. 21-22) and Petitioners further pleaded, in the alternative in the event the said provision in the initial contract could not be invoked for their benefit, as a bar to Respondent's right of recovery of damages due to the failure of the horses to have feed, water, and rest en route, Respondent's contributory negligence in failing to comply with a provision in subsequent bills of lading issued by Petitioners and likewise governed by the laws of the United States regulating interstate commerce, to the effect that Respondent and his agents would at their

own risk and expense, feed, water and rest the horses while en route in the event adequate facilities were furnished. (Tr. pp. 27-28).

Respondent, in reply to Petitioners' pleadings, answered that Petitioners were estopped from setting up the benefit arising from the initial contract in that they refused to carry the shipment under said contract and required Respondent to sign new contracts which, Respondent further alleged, could not be invoked by Petitioners because said contracts were obtained under duress. (Tr. pp. 40-42).

Petitioners' replied in their pleadings that the initial contract issued by the initial carrier, the Santa Fe Company, was the only legal and valid contract that could be entered into by Petitioners and Respondent under the laws of the United States governing interstate commerce, and that when the initial contract was issued and entered into its terms governed throughout the transportation of the shipment, and said terms of said initial contract could not be waived by agreement or conduct of the parties thereto, for the reason that a different view would antagonize the plain policy of the Federal Act regulating interstate shipments and open the door to the very abuses at which the act was aimed. (Tr. pp. 21-22).

On December 22, 1915, the case was tried in the County Court of Tarrant County, Texas, for Civil cases, before a jury and judgment was rendered for B. Leatherwood against the Texas & Pacific Railway Company for \$280.25, and against the Missouri, Kansas & Texas Railway of Texas for \$56.05. (Tr. p. 75). Petitioners perfected an appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas, and on February 24, 1917, after said cause had been submitted

before the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas, the said judgment rendered in the trial Court was in all respects affirmed by the said Court of Civil Appeals, (Tr. p. 402) a written opinion being handed down. (Tr. p. 396).

On March 9th, 1917, Petitioners herein filed their motion for a rehearing of said cause before said Court of Civil Appeals (Tr. pp. 313-383) and on the 5th day of April, 1917, filed their motion before said Court requesting certain questions before the Court be certified to the Supreme Court of Texas for answer (Tr. pp. 390-395), both of which said motions were overruled on the 2nd day of June, 1917. (Tr. pp. 402-403).

The action of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas, as aforesaid being final, no appeal from said Court to the Supreme Court of Texas being permissible under the laws of Texas in a case originating in a Court of this nature, the Petitioners herein apply to this Honorable Court for relief.

GENERAL REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

The following are the two Federal questions presented to this Court, with the propositions of law contended for by Petitioners:

FIRST FEDERAL QUESTION.

The construction of the bill of lading issued by the initial carrier at Watrous, New Mexico, pursuant to the Federal Act, and covering the through transportation of Respondent's shipment to Waco, Texas, and the denial to Petitioners herein by the State Court

of Texas, of certain rights arising from the terms of this bill of lading which Petitioners especially pleaded, present a Federal question.

The following four propositions of law are contended for by Petitioners herein, under Federal Question No. 1, as presented:

FIRST PROPOSITION UNDER FIRST FEDERAL QUESTION.

The provision in the initial contract issued by the initial carrier at Watrous, New Mexico, pursuant to the Federal Act, and covering the through transportation of shipper's horses to Waco, Texas, and specifying that any suit for loss or damage to said shipment of horses must be brought within six months else same would be barred, was and is a valid and reasonable provision under the laws of the United States; and Petitioners herein having pleaded said initial contract and said provision therein as aforesaid, as well as the laws of the United States and rate governing same; and the undisputed evidence showing that said suit was not brought until more than sixteen months after the alleged loss and damage had occurred, the trial Court should have rendered judgment in favor of Petitioners herein, and such relief having been refused by the trial Court, and it being called to the attention of the Court of Civil Appeals of Texas, the said Court of Civil Appeals should have granted such relief to Petitioners herein, which it refused to do. And the act of said Court is in direct conflict not only with decisions of the Supreme Court of Texas, but also those of the Supreme Court of the United States, particularly that of the M., K. & T. vs. Harriman, 227 U. S. 657.

SECOND PROPOSITION UNDER FIRST FEDERAL QUESTION.

The initial contract issued by the initial carrier at Watrous, New Mexico, pursuant to the Federal Act, and covering the through transportation of Respondent's horses from Watrous, New Mexico, to Waco, Texas, under the laws of the United States was the only valid and legal contract that could be made by Respondent with any of the carriers handling his horses en route from Watrous, New Mexico, to Waco, Texas; and even though Petitioners herein, after receiving Respondent's horses from the initial carrier, the Santa Fe Lines, at El Paso, Texas, required Respondent to sign one of their contracts which contained terms different from those of the said initial contract, still said subsequent contracts were without consideration and were illegal and void under the laws of the United States, commonly known as the Hepburn Act, and the Carmack Amendment; and the subsequent carriers of Respondent's horses, could not be estopped from asserting the provisions of the initial contract executed at Watrous, New Mexico, by reason of their conduct in requiring Respondent to sign the subsequent contracts at El Paso and at Fort Worth, which were illegal, invalid, void and without consideration. Such being the case, and Petitioners having pleaded a provision in the initial contract requiring suit to be brought within six months after the loss or damage occurred, and Respondent's failure to comply with said provision, and that the laws of the United States governed said shipment, same being interstate in its nature, the trial Court should have rendered judgment for Petitioners inasmuch as they could not be estopped from setting up the benefits as aforesaid derived from the terms

of the initial contract by reason of their illegal and void acts in requiring Respondent to enter into subsequent contracts with them which were void and illegal, and without consideration and the trial Court having refused such relief the Court of Civil Appeals of Texas should have afforded such relief to Petitioners herein; and the act of said Court in refusing such relief is not only in direct conflict with the decisions of the Courts of Texas, but also those of the Supreme Court of the United States, particularly those of So. Ry. vs. Prescott, 240 U. S. 633; G. F. & A. Ry. vs. Blish Milling Co., 241 U. S. 190, and M., K. & T. vs. Ward, Ad. Sheet Supreme Court Reporter, July 15, 1917, page 619.

THIRD PROPOSITION UNDER FIRST FEDERAL QUESTION.

Respondent herein, the shipper of the horses, having pleaded that Petitioners herein, the connecting carriers handling Respondent's shipment, were estopped from claiming the benefits of the initial contract executed at Watrous, New Mexico, and covering the through transportation of Respondent's horses from Watrous, New Mexico, to Waco, Texas; yet, even though under the laws of the United States the subsequent contracts made at El Paso, Texas, and Fort Worth, Texas, were not illegal, invalid and void, and the plea of estoppel could be invoked, the trial Court should not have assumed, as a matter of fact, that Respondent, to his consequent damage, relied upon the action of the subsequent carriers in refusing to carry his horses under the initial contract and requiring new contracts to be entered into, but said issue should have been submitted to the jury as a question of fact upon Respondent's plea of estoppel

and the Court of Civil Appeals of Texas erred in not so holding, and Petitioners herein have been deprived of having the jury pass upon a question of fact claimed and arising out of the terms of the initial contract issued at Watrous, New Mexico; and have, therefore, been deprived of a right and privilege derived from a statute of the United States.

SECOND FEDERAL QUESTION.

The construction of the subsequent bills of lading issued on the interstate shipment from Watrous, New Mexico, to Waco, Texas, by the connecting carriers, petitioners herein, and the denial to Petitioners herein, by the State Court of Texas of certain rights arising from the terms of said bill of lading, which Petitioners especially pleaded—present a Federal Question.

PROPOSITION UNDER SECOND FEDERAL QUESTION.

Even though the initial contract issued by the Santa Fe Lines at Watrous, New Mexico, and covering the through transportation of Respondent's horses from Watrous, New Mexico, to Waco, Texas, is not binding, under the circumstances of this case, and the subsequent contract made by the Texas & Pacific Railway Company at El Paso, is the contract that governs this shipment while being handled by the Texas & Pacific Railway Company; still, said contract would be governed by the laws of the United States regulating interstate commerce and the trial Court should have granted Petitioner's, Texas & Pacific Railway Company, request asking that the question as to the Respondent's contributory negligence in failing to feed, water and rest, load, unload

and reload, his horses while in transit be submitted to the jury, this duty having been pleaded by Petitioners as one of the provisions of the contract issued by the Texas & Pacific Railway Company, and there having been introduced evidence that the said carriers furnished reasonable facilities for the performance of said duties, and especially in view of the fact that Respondent had pleaded damage to his horses by reason of their failure to have feed, water and rest between Big Springs, Texas, and Waco, Texas, and Petitioners having pleaded the contributory negligence of Respondent in violating his agreed duty as a bar to the recovery of such damages; and the trial Court having refused to submit said issue to the jury the Court of Civil Appeals should have reversed and remanded the case in order that Petitioners might not be deprived of their right and privilege to have the jury pass upon a defense arising from a contract governed by the laws of the United States.

CONCLUSION.

Petitioners herein have filed a brief containing Authorities and Argument upon the propositions of law relied upon as hereinbefore set out; and respectfully direct the attention of this Honorable Court to said brief for a full discussion of the points of law for which Petitioners contend.

Your Petitioners are advised and verily believe that the said judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas is final and that same is erroneous, and that this Honorable Court should require that this cause be certified to it for its review and determination.

A certified copy of the entire record of the case, including the proceedings in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, is furnished as an exhibit to this Petition in accordance with Section 3, of Rule 37, of this Court.

WHEREFORE, your Petitioners respectfully pray that a Writ of Certiorari or otherwise, be issued under the seal of this Court directed to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas, commanding said Court to certify and send to this Court, a full and complete transcript of the record and all proceedings had in the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas, in this cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by Section 1214, of the Laws of the United States and Section 237 of the Judicial Code, as amended September 6, 1916, and that the judgment of said Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, be reversed and the cause be remanded to the County Court of Tarrant County, Texas, for Civil cases, with directions to said Court to enter judgment in favor of Petitioners herein, and for such other relief as may seem proper, and your Petitioners will ever pray.

TEXAS & PACIFIC RAILWAY COMPANY,
MISSOURI, KANSAS & TEXAS RAILWAY OF TEXAS,

By *George Thompson*

J. H. Barringer Jr.
Solicitors for Petitioners.

George Thompson
Of Counsel.

STATE OF TEXAS, }
COUNTY OF TARRANT. }

George Thompson, being duly sworn, says he is one of the counsel for Petitioners; that he has read, examined, and is familiar with the foregoing Petition, and that matters stated therein are true and correct as he verily believes; that the same is not made for the purpose of delay, but that, in his opinion, said Petition is meritorious, well founded in law, and ought to be granted and a writ issued.

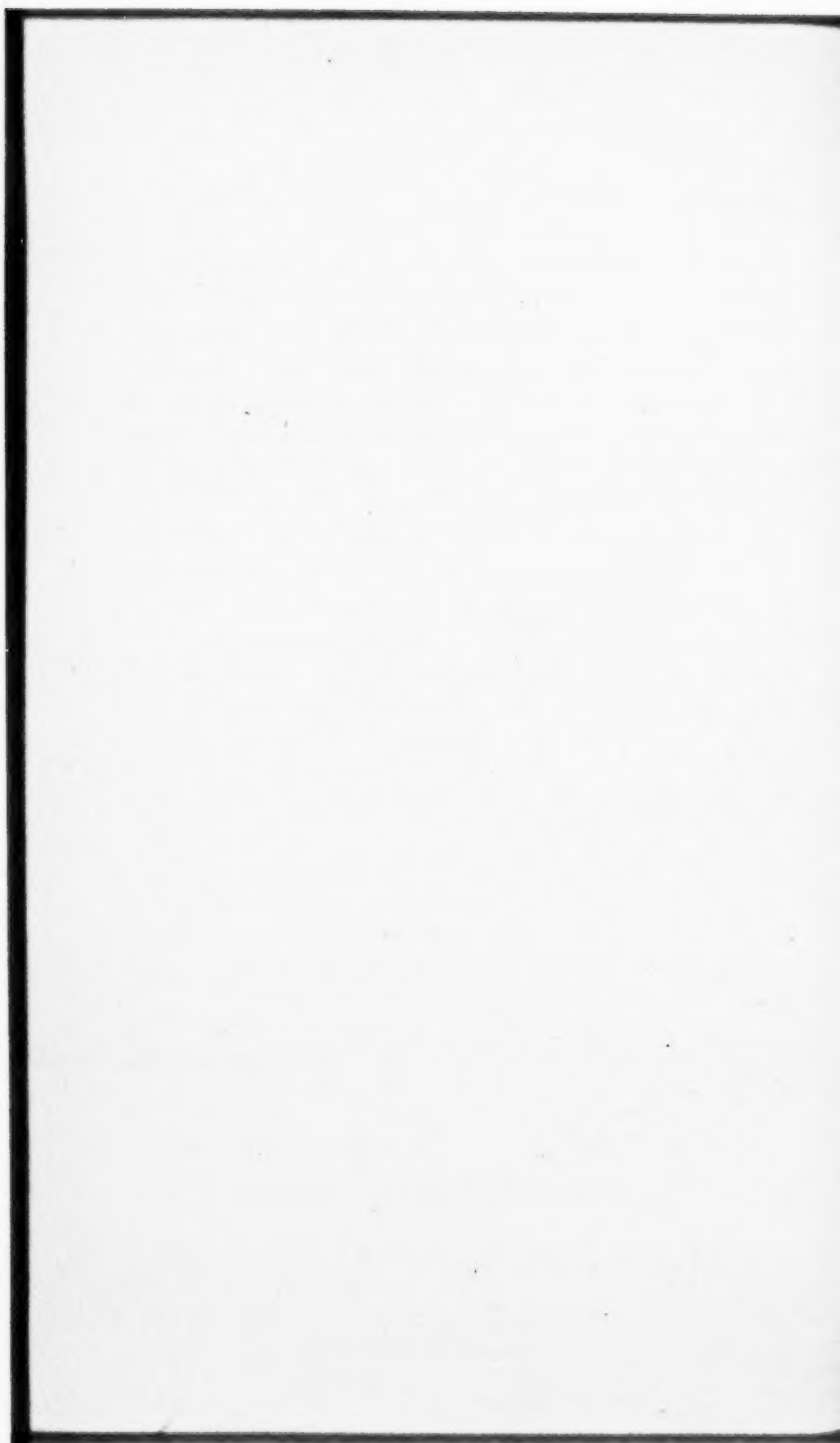
GEORGE THOMPSON.

Subscribed and sworn to, before me, by the said George Thompson, on this, 28th day of July, 1917.

MARY MCSPADDEN,

Notary Public in and for Tarrant County, Texas.

(SEAL)



IN THE
SUPREME COURT OF THE UNITED STATES

TEXAS & PACIFIC RY. CO.

AND

MISSOURI, KANSAS & TEXAS
RAILWAY OF TEXAS,

PETITIONERS,

vs.

B. LEATHERWOOD,

RESPONDENT.

No. _____

To the above named B. Leatherwood, Respondent:

The Respondent, B. Leatherwood, is hereby notified that on Monday, August 20, 1917, during adjournment of the Supreme Court of the United States, and pursuant to Rule 37, Section 4 thereof, Petitioners will file the attached Argument in support of the Petition for Writ of Certiorari, to be filed on the same day, copies of both having been supplied to you.

GEORGE THOMPSON,
J. H. BARWISE, JR.,
Solicitors for Petitioners.

George Thompson
Of Counsel.

The foregoing notice is hereby accepted, and delivery of the attached argument is hereby acknowledged.

This the _____ day of _____, 1917.

Solicitors for Respondent.

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No.

IN THE
Supreme Court of the United States

October Term, 1917.

TEXAS & PACIFIC RAILWAY COMPANY
AND
MISSOURI, KANSAS & TEXAS RAILWAY
OF TEXAS
Petitioners,

vs.

B. LEATHERWOOD,
Respondent.

ARGUMENT OF PETITIONERS IN SUPPORT OF APPLICATION FOR WRIT OF CERTIORARI, TO BE DIRECTED TO THE COURT OF CIVIL APPEALS FOR THE SECOND SUPREME JUDICIAL DISTRICT OF TEXAS, AT FORT WORTH, TEXAS, TO BRING BEFORE THIS HONORABLE COURT THE CASE NO. 8517, THERE PENDING, ENTITLED TEXAS & PACIFIC RAILWAY COMPANY ET AL., APPELLANTS, VS. B. LEATHERWOOD, APPELLEE.

GEORGE THOMPSON,
J. H. BARWISE, JR.,
Counsel for Petitioners.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners respectfully present the following argument and list of authorities upon the propositions

of law presented in the Petition for Writ of Certiorari heretofore filed in this Court:

THE SUPREME COURT OF THE UNITED STATES HAS JURISDICTION TO REVIEW THIS CASE BECAUSE A FEDERAL QUESTION IS PRESENTED.

In the case of *Adams Express Co. vs. Croninger*, 226 U. S. 491, Mr. Justice Lurton said:

"The answer relies upon the act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887, as the only regulation applicable to an interstate shipment and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that act. This defense was denied. This constitutes the Federal question and gives this Court jurisdiction."

In the case of *M., K. & T. vs. Harriman*, 227 U. S. 657, Mr. Justice Lurton said:

"As the transaction was an interstate shipment the case comes here upon questions which involve the validity of certain provisions in the contract of shipment when tested by the twentieth section of the act to regulate commerce, as amended by the act of June 29, 1906."

In the case of *Georgia-Florida Ry. Co. vs. Bish Milling Co.*, 241 U. S. 190, Mr. Justice Hughes said:

"These decisions also establish that the question as to the proper construction of the bill of lading is a Federal question."

These decisions, as well as numerous subsequent ones, conclusively establish that the Supreme Court of the United States has jurisdiction to review this case.

ARGUMENT UPON FIRST AND SECOND PROPOSITIONS AT LAW UNDER FIRST FEDERAL QUESTION.

Petitioners respectfully present the following argument and list of Authorities upon the *First and Second Propositions of Law under the First Federal question* as presented in the *Petition for Writ of Certiorari* heretofore filed herein:

Petitioners pleaded the provision in the initial contract executed by the Santa Fe lines at Watrous, New Mexico, and covering the shipment from Watrous, New Mexico, to final destination, Waco, Texas, to the effect that *suit must be brought by the shipper within six months after the loss or damage occurred and failure to bring suit within such time would be a bar to the shipper's recovery* and further pleaded that Respondent had so failed to bring his suit within six months after the loss and damage occurred. Petitioners introduced the initial contract containing said provision and introduced Respondent's original petition showing that suit was brought on March 2nd, 1915, the initial contract being signed on October 9th, 1913. It therefore must be admitted without dispute that under this state of facts Respondent would *not* be entitled to a judgment in this case, having failed to bring suit against Petitioners within six months after his loss and damage occurred. The only matters left to be determined are, therefore: First—*Whether or not the initial contract required to be executed by the initial carrier on through transportation of an interstate shipment is the only legal, valid, and binding contract that can be made under the Interstate Commerce Act, and the converse of this proposition, whether or not any subsequent contracts made by connecting carriers*

with the shipper on an interstate shipment and after the initial contract has been signed by the carrier and shipper at the point of origin, *are without consideration, illegal, and void.* And: Second—*Whether or not connecting carriers on an interstate shipment who refuse to carry a shipment under the initial contract issued by the initial carrier for through transportation and demand the execution of new contracts between the shipper and themselves, are thereafter estopped from claiming any benefits under the provisions of the initial contract executed by the initial carrier.*

We will take these propositions up in their respective orders. It is our contention, and we believe, that same is well settled by the United States Supreme Court, that the law governing interstate commerce and commonly termed the Carmack Amendment, requires the initial carrier to execute a contract on an interstate shipment and that this contract is the only legal and binding contract that can be made and that all other contracts made by the shipper or connecting carriers en route after the execution of the original contract by the initial carrier are without consideration, illegal and void.

Two of the Courts of Civil Appeals of Texas have so held, the decisions being approved by the Supreme Court of Texas. We refer to the cases of *A. T. & S. F. vs. Word*, 159 Southwestern 375, and *M., K. & T. of T. vs. Ward*, 169 S. W. 1035.

In the case of *Atchison, Topeka and Santa Fe vs. Word*, 159 S. W. 375, Word sued the Atchison, Topeka and Santa Fe and the Fort Worth and Denver City Railway Companies for damages to a shipment of cattle upon a contract issued by the initial carrier, the Fort Worth and Denver City Railway Company,

at Simons, Texas, the cattle to be transported to Summit, Kansas. The intermediate carriers, the Atchison, Topeka & Santa Fe and Southern Kansas Railway Companies pleaded a subsequent contract made en route and the Court of Civil Appeals of Texas, at Amarillo, in discussing the subsequent contract made by the intermediate carriers said:

"If the Fort Worth & Denver Railway Company was a principal in making the contract for the through shipment and received the consideration therefor, the act of the Santa Fe in procuring a contract for such shipment over the same route, was, as we think, without consideration and contrary to law. It was but the agent of the Denver Road and under the law was charged with the duty of carrying out the contract of its principal, with no right or power to engraft new conditions and stipulations on the contract already lawfully executed, binding it fully to perform its part of the contract of carriage under the terms of said contract. Stipulations in the contract of the initial carrier were ineffectual insofar as not authorized by the Interstate Commerce Act, whether for its benefit or that of the intermediate carrier. Any provision valid in the initial carrier's contract for its own benefit will therefore inure to the benefit of the connecting carrier. *Kansas City S. R. Co. vs. Carl*, 227 U. S. 639; 33 Supt. Ct. 391. In that case it is said 'The liability of any carrier in the route * * * for loss or damage is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act.' *Adams Express Co. vs. Croninger*, 226 U. S. 491, 33 Sup. Ct. 148, L. Ed. 314; *Railway Co. vs. Latta*, 226 U. S. 519, 33 Sup. Ct. 155, 57 L. Ed. 328; *Railway Co. vs. Miller*, 226 U. S. 513, 33 Sup. Ct. 155, 57 L. Ed. 323; *Railway Co. vs. Harriman Bros.*, 227 U. S. 657, 33 Sup. Ct. 397.

"It will be seen from the above authorities that the contract of the initial carrier is one fixing the liability of the parties executing the contract, as well as that of the connecting carrier. *It follows that any contract made, or attempted to be made, by the intermediate carrier has no binding effect with reference to the shipment while in the course of transportation.* The case of *Railway Co. vs. Carl*, supra, appears to be authority for the shipper to sue the intermediate carrier direct. *Railway Co. vs. Ray*, 127 S. W. 281. And we hold that he may sue the initial carrier, together with the connecting carriers, over whose lines of road the shipment is routed, and the respective liabilities of the parties fixed in that suit."

We especially direct the attention of this Court to the fact that the Supreme Court of the State of Texas approved the Word case, having denied a writ of error. The same question was also presented to the Court of Civil Appeals of Texas at Austin in the case of *M. K. & T. vs. Ward*, 169 S. W. 1035. Judge Rice speaking for the Court of Civil Appeals in a very full opinion after reviewing the opinions of the Supreme Court of the United States, approved the decision of Chief Justice Huff in the Word case, saying:

"In the *Atchison, Topeka & Santa Fe Railway Company vs. Word*, supra, where a similar question to the one here presented was involved, Mr. Justice Huff of the Amarillo Court of Civil Appeals, said:

"If the Fort Worth & Denver Railway Company was a principal in making the contract for the through shipment and received the consideration therefor, the act of the Santa Fe in procuring a contract for such shipment over the same route was, as we think, without consideration and contrary to law. It was but the agent of the Denver Road, and

under the law was charged with the duty of carrying out the contract of its principal, with no right or power to ingraft new conditions and stipulations on the contract already lawfully executed, binding it fully to perform its part of the contract of carriage under the terms of said contract. Stipulations in the contract of the initial carrier were ineffectual in so far as not authorized by the Interstate Commerce Act, whether for its benefit or that of the intermediate carrier. Any provision valid in the initial carrier's contract for its own benefit will therefore enure to the benefit of the connecting carrier'—citing, *Kansas City S. R. Co. vs. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683.

"In that case it is said:

"The liability of any carrier in the route
* * * for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act,' citing *Adams Express Company vs. Croninger*, *supra*, and the other cases relied upon by appellees.

"Concluding, he says:

"It will be seen from the above authorities that the contract of the initial carrier is one fixing the liability of the parties executing the contract, as well as that of the connecting carrier. It follows that any contract made, or attempted to be made, by the intermediate carrier, has no binding effect with reference to the shipment while in the course of transportation. The case of Railway vs. Carl, supra, appears to be authority for the shipper to sue the intermediate carrier direct. Ry. Co. vs. Ray, 127 S. W. 281. And we hold that he may sue the initial carrier, together with the connecting carriers, over whose lines of road the shipment is routed, and the re-

spective liabilities of the parties fixed in that suit.'

"In this case writ of error was denied by the Supreme Court; and, as the doctrine therein announced is applicable to the instant case, we think it decisive of the question here presented, and overrule the first assignment."

Under the decisions of the Supreme Court of the United States as well as the decisions of the Supreme Court of Texas and the Courts of Civil Appeals of Texas, there can be no doubt that the subsequent contracts made by the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway of Texas, on this shipment were illegal, without consideration, and void.

We desire to briefly review and direct the attention of this Honorable Court to the decisions of the Supreme Court of the United States bearing upon this question:

The case of *M., K. & T. vs. Harriman*, 227 U. S. 657, holds in a most decisive manner that a clause in an initial contract covering an interstate shipment to the effect that suit must be filed within ninety days and failure to so file suit will be a bar to the suit, is reasonable as a matter of law and that the state decisions will not govern such a case.

The case of *C. N. O. & T. P. Ry. Co. vs. Rankin*, 241 U. S. 319, holds in a most decisive manner that where the initial bill of lading signed both by the carrier and shipper recited that lawful alternate rates based upon valuation were offered to the shipper and said bill of lading is signed by both carrier and shipper, the same constitutes admissions by the shipper and prima facie evidence of choice of rates and casts upon the shipper the burden of proof to contradict his own admissions.

Bearing in mind the foregoing decisions, let us go back and trace the history and progress of the Federal decisions governing this question. The leading case, to which all subsequent cases refer, is that of *Atlantic Coast Line vs. Riverside Mills*, 219 U. S. 186. This case was decided on January 3rd, 1911, and involved the question of whether or not under the Carmack Amendment the initial carrier could limit its liability on an interstate shipment to loss and damage occurring on its own line. The Supreme Court of the United States, speaking through Mr. Justice Lurton, in a very exhaustive opinion fourteen pages in length, held that the initial carrier could not make a contract limiting its liability to loss and damage on its own line, *the Carmack Amendment regulating interstate commerce contemplating that the initial carrier should issue a contract for the entire transportation in order that uniformity of handling could be obtained*. We desire to make the following quotations from said case:

"The indisputable effect of the Carmack Amendment is to hold the initial carrier engaged in interstate commerce and 'receiving property for transportation from a point in one state to a point in another state' as having contracted for through carriage to the point of destination, using the lines of connecting carriers as its agents. Independently of the Carmack Amendment the carrier, when tendered property for such transportation, might elect to contract to carry to destination, in which case it necessarily agreed to do so through the agency of other and independent carriers in the line; or it might elect to carry safely over its own lines only and then deliver to the next carrier, who would then become the agent of the shipper. In the first case the receiving carrier's liability, as carrier,

extends over the whole route, for, on obvious grounds, the principal is liable for the acts of its agent. In the other case its carrier liability ends at its own terminal, and its further liability is merely that of a forwarder. Having this power to make the one or the other contract, the only question which has occasioned a conflict in the decided cases was whether it, in the particular case, made the one or the other."

"In this conflicting condition of the decisions as to the circumstances from which an agreement for through transportation of property designated to a point beyond the receiving carrier's line might be inferred, Congress by the act here involved has declared, in substance, that the act of receiving property for transportation to a point in another State and beyond the line of receiving carrier shall impose on such receiving carrier the obligation of through transportation with carrier liability throughout. But this uncertainty of the nature and extent of the liability of a carrier receiving goods destined to a point beyond its own line was not all which might well induce the interposition of the regulating power of Congress. Nothing has perhaps contributed more to the wealth and prosperity of the country and the almost universal practice of transportation companies to co-operate in making through routes and joint rates. Through this method a situation has been brought about by which, though independently managed, connecting carriers become in effect one system. This practice had its origin in the mutual interests of such companies and in the necessities of an expanding commerce.

"The tenth clause of the conditions annexed to this bill of lading, and shown elsewhere, affords a fair illustration of the customary methods of connecting carriers to co-operate for their mutual benefit in carrying on transportation

begun by one which must be continued by other lines over which the thing to be transported must go. The receiving carrier makes the rate and the route, and as the agent of every such connecting carrier executes a contract which is to bind each of them. 'severally,' but not 'jointly,' one of the terms of the agreement being that each carrier shall be liable only for loss or damage occurring on its own line. Through this well known and necessary practice of connecting carriers there has come about without unity of ownership or physical operation, a singleness of charge and a continuity of transportation greatly to the advantage of the carrier and beneficial to the great and growing commerce of the country.

"Along with this singleness of rate and continuity of carriage there grew up the practice by receiving carriers, illustrated in this case, of refusing to make a specific agreement to transport to points beyond its own line, whereby the connecting carrier for the purpose of carriage would become the agent of the primary carrier. The common form of receipt, as the Court may judicially know, is one by which the shipper is compelled to make with each carrier in the route over which his package must go a separate agreement limiting the carrier's liability of each separate company to its own part of the through route. As a result the shipper could look only to the initial carrier for recompense for loss, damage, or delay occurring on its part of the route. If such primary carrier was able to show a delivery to the rails of the next succeeding carrier, although the packages might and usually did continue the journey in the same car in which they had been originally loaded, the shipper must fail in his suit. He might, it is true, then bring his action against the carrier so shown to have next received the shipment. But here in turn, he

might be met by proof of safe delivery to a third separate carrier. In short, as the shipper was not himself in possession of the information as to when and where his property had been lost or damaged and had no access to the records of the connecting carriers who in turn had participated in some part of the transportation, he was compelled in many instances to make such settlement as should be proposed.

"This burdensome situation of the shipping public in reference to interstate shipments over routes including separate lines of carriers was the matter which Congress undertook to regulate. Thus when this Carmack Amendment was reported by a conference committee, Judge William Richardson, a Congressman from Alabama, speaking for the committee of the matter which it was sought to remedy, among other things, said:

"One of the great complaints of the railroads has been—and, I think, a reasonable, just, and fair complaint—that when a man made a shipment, say, from Washington, for instance, to San Francisco, Cal., and his shipment was lost in some way, the citizen had to go thousands of miles, probably, to institute his suit. The result was that he had to settle his damages at what he could get. What have we done? We have made the initial carrier, the carrier that takes and receives the shipment, responsible for the loss of the article in the way of damages. We save the shipper from going to California or some distant place to institute his suit. Why? The reasons for inducing us to that were that the initial carrier has a through route connection with the secondary carrier, on whose route the loss occurred, and a settlement between them will be an easy matter, while the shipper would be at heavy expense in the in-

stitution of a suit. If a judgment is obtained against the initial carrier, no doubt exists but that the secondary carrier would pay it at once. Why? Because the arrangement, the concert, the co-operation, the through route courtesies between them would be broken up if prompt payment were not made. We have done that in conference.' (Cong. Rec. Pt. 10, p. 9580).

"It must be conceded that the effect of the act in respect of carriers receiving packages in one State for a point in another and beyond its own lines, is to deny such an initial carrier the former right to make a contract limiting liability to its own line.

"It is obvious, from the many decisions of this court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously affect the public interests. Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the States being one of them, the power is absolute except as limited by other provisions of the Constitution itself.

"That a situation had come about which demanded regulation in the public interest was the judgment of Congress. The requirement that carriers that undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be required as a condition of continuing

in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. *The rule is adopted to secure the right of the shipper by securing unity of transportation with unity of responsibility.* The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier. Neither does the regulation impose an unreasonable burden upon the receiving carrier. The methods in vogue, as the Court may judicially know, embrace not only the voluntary arrangement of through routes and rate, but the collection of the single charge made by the carrier at one or the other ends of the route. This involves frequent and prompt settlement of traffic balances. The routing in a measure depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again, the business association of such carriers affords to each facilities for locating the primary responsibility as between themselves which the shipper cannot have. These well-known conditions afford a reasonable security to the receiving carrier for a re-imbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves.

"If it is to be assumed that the ultimate power exerted by Congress is that of compelling co-operation by connecting lines of independent carriers for purposes of interstate transportation, the power is still not beyond the regulating power of Congress, since without merging identity of separate line or operation it stops with the requirement of oneness of charge, continuity of transportation and primary liability

of the receiving carrier to the shipper, with the right of reimbursement from the guilty agency in the route.

"In substance Congress has said to such carriers, 'if you receive articles for transportation from a point in one state to a place in another, beyond your own terminal, you must do so under a contract to transport to the place designated. If you are obliged to use the services of independent carriers in the continuation of the transit, you must use them as your own agents and not as agents of the shipper.' It is, therefore, not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable."

The above quoted case was followed by another opinion of the Supreme Court of the United States written again by Mr. Justice Lurton, to-wit: The case of Adams Express Co. vs. Croninger, 226 U. S. 499. In this case there was involved the validity of a provision in the bill of lading limiting the carrier's liability to an agreed value of \$50.00. As said in this case, the Carmack Amendment undoubtedly showed the purpose of Congress to bring contracts for interstate shipments under one uniform rule of law and therefore withdraw them from the influence of state regulations. Justice Lurton held in this case that the provision limiting the carrier's liability to \$50.00 was valid and that the shipper could not recover any greater sum from the carrier. Closely following this decision is that of the United States Supreme Court in the case of Kansas Southern Railway Company vs. Carl, 227 U. S. 639, the opinion of which was again rendered by Mr. Justice Lurton. The question in this case was whether or not the final car-

rier in the route was entitled to the benefit of a stipulation in an initial contract signed by the shipper releasing the initial carrier and all subsequent carriers from any loss or damage in excess of \$5.00 per cwt. In discussing this case, Justice Lurton said:

"As the shipment was interstate, thr contract was controlled by the twentieth section of the act of Congress of June 29th, 1909. The initial carrier under that provision of the Interstate Commerce Act, as an interstate carrier, holding itself out to receive shipments from a point upon its own line in one State to a point in another State upon the line of a succeeding and connecting carrier, came under liability not only for its own fault but also for loss or damage upon the line of a connecting carrier in the route: *Atlantic Coast Line vs. Riverside Mills*, 219 U. S. 186. Any stipulation in its own receipt was ineffective in so far as it was not authorized by the section of the act referred to, whether intended for its own benefit or that of the succeeding carrier. It is true that any limitation of liability contained in its contract which would be valid in its own behalf would likewise inure to the benefit of its connecting carrier. *The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the act as measured by the original contract of shipment so far as it is valid under the act..* This provision of the Interstate Commerce Act has been so fully considered and decided that we need not go further into the matter.

"That amendment undoubtedly manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule or law, and therefore, withdraw them from the influence of state regulation. *Adams vs. Croninger*, above cited. Every such initial carrier is required 'to issue a receipt or bill of lading

therefor' when it receives property for transportation from one state to another. Such initial carrier is made liable to the holder of such receipt for any loss or damage 'caused by it,' or by any connecting carrier in the route to whom it shall make delivery. It is then declared that no contract, receipt, rule, or regulation shall 'exempt' such a common carrier 'from the liability hereby imposed.' "

In this case the Supreme Court held that the final carrier was entitled to the benefits of the provisions contained in the initial contract.

In the case of *Cleveland, St. Louis Ry. Co. vs. Dettlebach*, 239 U. S. 588, the Supreme Court of United States held that the terminal carrier on an interstate shipment was entitled to the benefit of a provision in the initial contract releasing the value of the goods in the shipment, although the goods were lost by the terminal carrier while in the capacity of a ware-houseman.

We come now to several very important decisions handed down by Mr. Justice Hughes. In the case of *N. Y. P. & N. Ry. Co. vs. Peninsula Produce Exchange of Maryland*, 240 U. S. p. 34, Judge Hughes says:

"We need not review at length the considerations which led to the adoption of this amendment. These were stated in the *Atlantic Coast Line vs. Riverside Mills*, 219 U. S. 186, 199, 293. It was there pointed out that along with singleness of rate and continuity of carriage in through shipments there had grown up the practice of requiring specific stipulations limiting the liability of each separate company to its own part of the through route, and, as a result, the shipper could look to the initial carrier for recompense only 'for loss, damage, or delay,'

occurring on its own line. This 'burdensome situation' was the 'matter which Congress undertook to regulate.' And it was concluded that the requirement that interstate carriers holding themselves out as receiving packages for destinations beyond their own terminal should be compelled, 'as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies,' was within the power of Congress. The rule, said the Court in defining the purpose of the Carmack Amendment, *'is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility.'* And, again, we said in *Adams Express Company vs. Croninger*, 226 U. S. 491, that this legislation embraces 'the subject of the liability of the carrier under a bill of lading which he must issue.' The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon state regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.' "

In this case the Supreme Court held that the Carmack Amendment imposed on the initial carrier liability for delay occurring on the line of its connecting carrier without physical damage to the property.

Justice Hughes followed this opinion with that of *Southern Railway Company vs. Prescott*, 240 U. S. 633. In this case when the shipment arrived at the point of destination the terminal carrier notified the consignee of the arrival of the boxes, thereupon the consignee paid the entire freight charges on same and took four of the thirteen boxes away with him and the other nine boxes were left with the terminal carrier under an agreement that the terminal carrier

would keep them until the consignee had time to take them away. The remaining nine boxes were destroyed by fire. The terminal carrier pleaded a provision in the bill of lading issued by the initial carrier and the consignee took the position that there had been a delivery of the goods by the terminal carrier to the consignee, that the freight had been paid, and that the goods thereafter did not constitute part of the interstate shipment and that the loss of same by the terminal carrier was governed by the state law. In fact the Supreme Court of South Carolina took this position. In discussing this matter Justice Hughes said:

"As the shipment was interstate and the bill of lading was issued pursuant to the Federal Act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. The reference, above quoted, to the concession in the trial court cannot be taken to mean that this Federal question was not raised, for, as we have seen, it was distinctly presented and pressed; but we assume that the ruling, in substance, was that there was no dispute as to the fact that the goods had arrived, that the consignee had paid the freight and signed a receipt for the goods, and that the nine boxes had remained in the possession of the carrier under the permission given, as testified, by the carrier's agent. *The question is whether this admitted transaction had the legal effect of discharging the contract governed by Federal law and of creating a new obligation governed by state law.*

"It is also clear that with respect to the service governed by the Federal Statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (*Texas & Pacific Ry. Co. vs. Mugg*, 202 U. S.

242; Kansas Southern Ry. Co. vs. Carl, 227 U. S. 639, 652; Boston & Maine Ry. Co. vs. Hooker, 233 U. S. 97, 112; Louis. & Nas. Ry. Co. vs. Maxwell, 237 U. S. 94), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the Act. Chicago & Alton Ry. Co. vs. Kirby, 225 U. S. 155, 166; Atchison, Topeka & Santa Fe vs. Robinson, 233 U. S. 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privileges or facilities,' save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and *the conditions of liability while the goods are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling and the parties cannot substitute therefor a special agreement.*

"It is apparent that there had been no actual delivery of the nine boxes. The payment of the freight had no greater efficacy than if it had been made in advance of the transportation. The giving of a receipt for the goods by the consignee did not alter the fact that they were still held by the Railway Company awaiting actual delivery. *The transaction at most could not be deemed to accomplish more than if the parties had agreed that until such delivery the goods should be held under a special contract—in lieu of the prescribed conditions, and this they could not effect without violating the Act which governed the shipment.* It could not be said, for example, that while under the filed regulations the Railway Company was to make a 'reasonable charge for storage' pending delivery that it could agree with a particular shipper or con-

signee, to hold gratuitously; nor could it alter the terms of its responsibility while the goods remained undelivered. *The actual service in holding the goods continued and we must look to the bill of lading to determine the legal obligation attaching to that service.*"

We call the attention of this court to the words of Judge Hughes: "*That even though the parties to the shipment had entered into a special contract in lieu of the prescribed conditions in the initial bill of lading, yet said subsequent contract would be a variation of the act which governed the shipment.*"

In the case of *No. Pacific vs. Wall*, 241 U. S., page 87, decided by the Supreme Court of the United States on April 24th, 1916, the Court held that a stipulation in a bill of lading on an interstate shipment of cattle, that the shipper must, as a condition precedent to his right of recovery for injury to the cattle while in transit, give notice thereof in writing to some officer or agent of the initial carrier before the cattle are removed from the pens at destination or mingled with other live stock, *is to be construed in the light of the Carmack Amendment making the connecting or delivering carrier the agent of the initial carrier*, and further holding that said stipulation was reasonable, and that failure to comply with same by the shipper was a bar to his recovery. In rendering the decision in this case Justice Van Devanter said:

"A bill of lading is a contract within this rule. The Carmack Amendment to the Interstate Commerce Act (§ 7, C. 3591, 34 Stat. 584, 593), which was in force when this bill of lading was issued, directs a carrier receiving property for interstate transportation to issue a through bill of lading therefor, although the place of des-

tionation is on the line of another carrier; subjects the receiving carrier to liability for any injury to the property caused by it or any other carrier in the course of the transportation, and requires a connecting carrier on whose line the property is injured to reimburse the receiving carrier where the latter is made to pay for such injury. *Thus, under the operation of the amendment, the connecting carrier becomes the agent of the receiving carrier for the purpose of completing the transportation and delivering the property."*

The last named case was followed by Georgia, Florida & Alabama Ry. Co. vs. Blish Milling Co., 241 U. S. 190. This case was decided on May 8th, 1916, and the opinion was delivered by Mr. Justice Hughes. In this case Judge Hughes says:

"These decisions also establish that the question as to the proper construction of the bill of lading is a Federal question.

"There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. *The statute casts upon the initial carrier responsibility with respect to the entire transportation. The aim was to establish unity of responsibility,* (Atlantic Coast Line vs. Riverside Mills, 219 U. S. 186, 199-203; N. Y. P. & N. Ry. Co. vs. Peninsula Produce Exchange, 240 U. S. 34, 38), and the words of the statute are comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation which, as defined in the Federal Act, includes delivery. It is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carriers makes a misdelivery, the initial carrier is liable; and when it asserts in its bill of lading a

provision requiring reasonable notice of claims 'in case of failure to make delivery,' the fair meaning of the stipulation is that it includes all cases of such failure, as well as those due to misdelivery as those due to the loss of the goods. *But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. AS WE HAVE SAID, THE LATTER TAKES THE GOODS UNDER THE BILL OF LADING ISSUED BY THE INITIAL CARRIER, AND ITS OBLIGATIONS ARE MEASURED BY ITS TERMS.* (Kansas Southern Ry. vs. Carl, *supra*; Southern Railway vs. Prescott, *supra*); and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery. The clause gave abundant opportunity for presenting claims and we regard it as both applicable and valid.

"In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but as the court said, 'If we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivery carrier.' (15 Ga. App. p. 147). It is urged however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tar-

iffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. Chi. & Alt. Ry. vs. Kirby, 225 U. S. 153, 166; Kansas Southern Ry. vs. Carl, supra; A. T. & S. F. Ry. vs. Robinson, 233 U. S. 173, 181; Southern Ry. vs. Prescott, supra. We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it."

We believe that this case settles the point involved in this suit. Judge Hughes holds that a connecting carrier takes the goods under the bill of lading issued by the initial carrier and its obligations are measured by its terms, and he further holds that the parties interested in a shipment cannot waive the terms of the initial contract under which the shipment was made, pursuant to the Federal Act, nor can the carrier, by its conduct give the shipper the right to ignore those terms which are applicable to that conduct and hold the carrier to a different liability to that fixed by the agreement under the published tariff and regulations. To do so, says Judge Hughes, would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. If connecting carriers could waive and modify the provisions of the initial contract issued by the initial carrier under the Carmack Amendment, it would result in discrimination and unfair practices. For instance, take the carrier interested in this suit. We will assume that B. Leatherwood is a small shipper and after the initial contract was signed by him at Watrous, New Mexico, calling for the through transportation of his horses to Waco, Texas, the Texas & Pacific Railway Company and the Missouri,

Kansas & Texas Railway of Texas refused to recognize the initial contract and sought to modify same and waive its provisions and abandon it. Thereupon B. Leatherwood was required to execute a new contract. In another case we will presume a large shipper is interested and the connecting carriers, the Texas & Pacific Railway Company and the Missouri, Kansas & Texas Railway of Texas, do not care to dictate terms of carriage to the large shipper and they therefore accept and carry the large shipper's stock under the *provisions of the initial contract* and do not require him to execute subsequent contracts as they did Mr. Leatherwood. When they do this they produce a discrimination and they are not treating the shippers on the same basis. It was for this reason that Congress passed the Carmack Amendment to make a *uniform rule governing interstate shipments*; and it is for this reason that the *initial contract is the only valid and legal contract governing a shipment of interstate commerce*; and it is for this reason that *any subsequent contract made between any connecting carrier and the shipper is illegal, without consideration, and void*. But respondent will reply: "This holding deprives the parties of the liberty of contract."

Justice Lurton answered this very same objection in the Riverside Mills case, 219 U. S. 186. In this case, he said:

"It is obvious, from the many decisions of this Court, that there is no such thing as *absolute freedom of contract*. Contracts which contravene public policy can not be lawfully made at all, and the power to make contracts, may, in all cases, be regulated as to form, evidence and validity as to third persons. *The power of government extends to the denial of liberty of contract*

to the extent of forbidding or regulating every contract which is reasonably calculated to injuriously effect the public interests."

The only remaining question is whether or not, by reason of their act in refusing to transport the shipment of Respondent under the provisions of the initial contract and requiring the execution of the subsequent contracts, thereby, Petitioners *estopped* themselves from asserting any benefits under the initial contract. In Vol. 10 Ruling Case Law, p. 742, Sec. 59, it said:

"Under the rule that a person can never be estopped by an act that is illegal and void, a married woman is not estopped by a contract which she has no legal capacity to make. So she is not estopped to claim her land as against a contract for the sale thereof not acknowledged by her as required by statute."

And again, on page 801, Section 112, it is said:

"It is generally considered that, as between the parties to a contract, validity can not be given to it by *estoppel* if it is prohibited by law or is against Public Policy. Manifestly, the reason the limitation on the doctrine of estoppel presently under discussion, is that when the matter of illegality arises the question ceases to be one solely between the parties or between private individuals. Accordingly, an estoppel is not available to sustain a contract of carriage which is invalid under the Interstate Commerce Act."

In the case of *Melody vs. Great Northern Ry. Co.*, 127 Northwestern 543, the South Dakota Supreme Court held:

"There can be no doubt, we think, under the construction given the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 U. S. Comp. St. 1901, p. 3154) by the Federal courts, that every person dealing with an inter-

state carrier is as effectually bound by the law and the orders of the commission, as to both freight and passenger tariffs, as is the carrier himself. To hold that either party under any conditions may be estopped from asserting the illegality and invalidity of a contract made in violation of the interstate law and the orders of the commission, would afford an easy means for its evasion, and might result in its practical annulment."

In the case of *Illinois Central Ry. Co. vs. Henderson Elevator Co.*, 226 U. S. 441, the Supreme Court of the United States held that a railway company was not estopped from collecting the published tariff rate from the shipper notwithstanding a lower rate may have been quoted to the shipper by the carrier's agent. The reason for this rule is that it was unlawful for the carrier to transport the shipper's goods for a less rate than the published rate and an act of the carrier or its agent in quoting the shipper a less rate would not estop it from collecting the proper rate. A very good illustration of this doctrine may be found in the following case: A railway company enters into a contract to transport and deliver a car load of wheat from the State of Texas to the State of Missouri. The shipper agrees to pay the railway company the legal rate for said shipment. After the shipment is under way and when it reaches the terminal carrier, the terminal carrier enters into a second contract with the shipper to the effect that it will not collect the legal rate called for by the initial contract, but it agrees to charge and collect only one-half of the legal rate on said shipment. The shipper pays one-half of the legal rate as agreed upon between him and the subsequent carrier by reason of such subsequent contract and later the subse-

quent and terminal carrier brings suit against the shipper to collect the full rate as specified in the original or initial contract. The shipper answers: You refused to accept the full rate named in the initial contract. You waived it and entered into a contract with me to charge only one-half of the rate named in the initial contract and you are now estopped from claiming any benefit under the initial contract. The only logical answer to such a case is that the act of the terminal carrier in entering into the subsequent contract was illegal and void and that the subsequent carrier is not estopped from enforcing the initial contract and collecting the legal rate named therein. Such have been the decisions of all the courts. In fact, the case of *Texas & Pacific Ry. Co. vs. Mugg*, 202 U. S. 242, decided by the Supreme Court of the United States, held that the railway company was required to collect the correct legal charges, although it had previously agreed to transport same for less.

We might add in this connection that Respondent by his pleading of estoppel sought to estop the Petitioners from claiming the benefit of the initial contract by reason of the fact that Respondent and Petitioners abandoned the initial contract and entered into subsequent contracts which were illegal and void.. If we concede that the subsequent contracts made by Petitioners and Respondent were illegal and void, as we must necessarily do under the cases heretofore cited, then Respondent was a party to an illegal act and was in *pari delicto*. Respondent being equally guilty of an illegal act, the doctrine of *pari delicto* would prevent Respondent from asserting the estoppel pleaded by Respondent. In other words, Respondent seeks to estop Petitioners from claiming the

benefits under the initial contract by reason of Petitioners' illegal act in entering into subsequent contracts with Respondent. Respondent being a guilty party to said illegal acts, neither this Court nor any other Court would allow Respondent to argue that Petitioners were estopped by illegal acts in which Respondent himself participated.

But aside from these considerations, Petitioners assert they can not be estopped from setting up a defense under the initial contract, because at best *the ground of estoppel urged by Respondent is the conduct of Petitioners in refusing to carry the shipment under the initial contract, and requiring new contracts to be executed*; and this Court, itself, in the case of Georgia, Florida & Alabama Ry. Co. vs. Blish Milling Co., 241 U. S. 190, in an opinion rendered by Mr. Justice Hughes, on May 8, 1916, held:

"The parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier, by its *conduct*, give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations—a different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed."

In the Blish Milling case, the shipper declared the connecting carrier by its *conduct had abandoned the initial contract*; in our own case, Respondent asserts that *Petitioners, by their conduct, abandoned the initial contract*. But this very Court holds in the Blish Milling case that *the initial contract can not be abandoned, changed or modified either by agreement or by conduct*.

In conclusion we desire to say that one who has kept in close touch with the prevailing decisions regarding interstate commerce must necessarily be impressed with the insistent demand on the part of the Federal authorities that carriers shall treat all shippers alike; that no discriminations shall be allowed; that no shipper shall be given an advantage that another shipper does not enjoy. For this reason in many cases where shippers fail to file suit within the time provided by the bill of lading and shippers requested the carrier to waive the stipulation as to the time within which suit must be filed, the carriers have been compelled to refuse to waive such stipulations for the reason that if the carriers made an agreement to waive the provision in one case and declined to do so in another, the carriers would be guilty of discrimination. We have cited the court under the list of authorities to cases holding that it is unlawful for a railroad to grant any person or corporation any privilege or advantage under the Interstate Commerce Act. We especially call the attention of the Court to the case of Hocking Valley Railway Co. vs. U. S. 210 Fed. 737, where the carrier was fined \$42,000.00 for granting to one of the shippers the privilege of paying its freight on the credit system, when it demanded cash from other shippers. So we, therefore, see the necessity of having one contract issued by the initial carrier to govern the shipment throughout its journey, the provisions of which cannot be abandoned or waived either expressly or by the carriers' conduct. By this rule there is obtained equality in rights and privileges, as well as unity of transportation and unity of responsibility. For the rule to be otherwise would open the door for fraud

and discrimination; would antagonize the plain policy of the act, and open the door to the very abuses at which the act was aimed.

Since preparing the foregoing argument in support of the propositions of law presented under the First Federal Question, *there has been printed in the advance sheet of the Supreme Court Reporter of date July 15th, 1917, on page 619, the decision of the Supreme Court of the United States in the case of M., K. & T. Ry. Co. vs. Ward, which conclusively settles the law upon the questions presented.* In our preceding argument we have quoted, in support of the propositions of law for which we contend, the opinion of the Court of Civil Appeals at Austin, Texas, in the WARD case. We did not know at the time that the Ward case was on appeal before the Supreme Court of the United States. Its decision by this Court is decisive of the questions herein involved. In rendering the decision, Mr. Justice Brandeis said:

“Upon appeal by these defendants, the Court of Civil Appeals of the Third Supreme Judicial District affirmed the judgment, on the ground that the liability of the connecting carriers must be governed by the provisions of the bill of lading issued by the initial carrier,—(which did not require a written claim in thirty days),—and that the second bill of lading was void under the Carmack Amendment (Tex. Civ. App., 169 S. W. 1035). Upon denial of a petition for rehearing the case was brought here on writ of error.

“The purpose of the Carmack Amendment has been frequently considered by this Court. It was to create in the initial carrier unity of responsibility for the transportation to destination. Atlantic Coast Line Ry. Co. v. River-

side Mills, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164; Northern P. Ry. Co. vs. Wall, 241 U. S. 87, 92, 60 L. Ed. 905, 907, 36 Sup. Ct. Rep. 493. And provisions in the bill of lading inconsistent with that liability are void. Norfolk & W. Ry. Co. vs. Dixie Tobacco Co., 228 U. S. 593, L. Ed. 980, 33 Sup. Ct. Rep. 609. While the receiving carrier is thus responsible for the whole carriage, each connecting road may still be sued for damages occurring on its line; and *the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading. The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not altered by the second, issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void.*

"The railway companies contend that while the Carmack Amendment makes the receiving carriers pay for all liability incurred by the connecting lines, the question of whether there is any such liability or not must be determined by reference to the separate contracts of each participating carrier, and not to the contract of the initial carrier alone. If, as contended, a shipper must, in order to recover, first file his 'verified Claim' with the connecting carrier who caused the injury, as provided in a separate bill of lading issued by such carrier, the shipper would still rest under the burden of determining which of the several successive carriers was at fault. Such a construction of the Carmack Amendment would defeat its purpose, which was to relieve shippers of the difficult, and often impossible, task of determining on which of the

several connecting lines the damage occurred. For the purpose of fixing the liability, the several carriers must be treated, not as independent contracting parties, but as one system; and the connecting lines become in effect mere agents, whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier. *Atlantic Coast Line Ry. Co. vs. Riverside Mills*, 219 U. S. 186, 206, 55 L. Ed. 167, 182, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. 164; *Galveston, H. & S. A. Ry. Co. vs. Wallace*, 223 U. S. 481, 56 L. Ed. 516, 523, 32 Sup. Ct. Rep. 205.

*"The railway companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record discloses no evidence of intention to make such a waiver and there was no consideration for it. Furthermore, as stated in Georgia, F. & A. R. Co. vs. Blish Mill Co., 241 U. S. 190, 197, 60 L. Ed. 948, 952, 36 Sup. Ct. Rep. 541, 'the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act * * ** A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed.'

"Judgment affirmed."

The case of *"B. Leatherwood"* is in no wise different from that of *"Ward,"* except as to the party affected by the application of the rule announced by Mr. Justice Brandeis. In the *Ward* case, this Honorable Court held that (1) the initial contract was the contract that governed an interstate shipment throughout; (2) that subsequent contracts were without consideration and were void; and (3) that initial contract could not be waived by conduct, changed or modified by consent. In this, the *Leatherwood* case, Petitioners contend for the very prin-

ciples of law that the Supreme Court of the United States has announced in the Ward, Prescott and Blish Milling Co. cases.

There remains nothing to be done in this case save apply the principles of law announced by this Court. That this may be done, we respectfully request this Court to grant the Petition for a Writ of Certiorari.

ARGUMENT UPON THIRD PROPOSITION OF LAW UNDER FIRST FEDERAL QUESTION.

Respondent pleaded that Petitioner's were estopped from setting up the terms of the Initial Bill of Lading which provided that suit for loss or damage should be instituted within six months after the loss or damage occurred, else same would be barred, for the reason that when the shipment reached El Paso, Texas, from Watrous, New Mexico, and was delivered to Petitioners by the Initial Carrier, the Santa Fe Railway Company, the Petitioners refused to carry the shipment under the initial contract and required Respondent to enter into new contracts with each of them.

This was in effect a plea of "estoppel in pais." The trial Court assumed as a matter of law that said plea of estoppel was good. It is the contention of Petitioners that if the subsequent contracts were not illegal and void as has been argued heretofore, then it was a matter for the jury to determine *whether or not Respondent* relied upon *the action and conduct of Petitioners* to his consequent injury and damage; and the trial court should not have assumed such to be a fact.

In Vol. V, Page 945, of the Encyclopedia of United States Supreme Court Reports, published by the Michie Company, under Section 5, the rule is stated:

"No estoppel in 'pais can be created, except by conduct which the person setting up the estoppel *has the right to rely upon, and does in fact rely upon and act upon.*' "

In support of this proposition there is cited the case of *Wiser vs. Lawler*, 189 U. S. 260, 47 Ed. 802, and many others by the same court. In referring to the *Wiser vs. Lawler* case, supra, we find this language of Mr. Justice Brown:

"So, too, to constitute an estoppel, either by express representation or by silence, there must not only be a duty to speak, but the *purchase must have been made in reliance upon the conduct of the party sought to be estopped.*"

This is an elementary proposition of law in the Doctrine of Estoppel.

However, we cite a few cases of different states upon same:

"In a suit to recover land, defendants *were not estopped to assert* that they had not conveyed the land, by establishment of lines and plats, *where the purchase was not made in reliance thereon.*" (Texas) *Ware vs. Perkins*, 178 S. W. 846.

"There is no estoppel unless the person claiming it *relies on the conduct.*" (Vermont) *Stevens vs. Blood*, 96 Atlantic, 697.

"To constitute estoppel the person asserting it must have been induced by the acts set up to do the things he did." (Oklahoma) *Williamson vs. King*, 158 Pacific, 1142.

"An adjoining landowner held *not estopped* to claim damages from defendants filling up a ravine crossing the street, though he was defendant's foreman in the work; the *elements of reliance by defendant on his acts and conduct being lacking* (Michi-

gan) Weller vs. Harrison Land Co., 161 N. W. 894.

Respondent alleged that Petitioners refused to carry the shipment under the Initial Contract; and required him to sign new contracts with each of them. The question now arises: "Did Respondent *rely* upon the assertion of Petitioners that they would not carry his shipment under the terms of the initial contract." Respondent was charged with *notice as a matter of law* that under the Carmack Amendment, Petitioners were the agents of the Initial Carrier, the Santa Re Railway Company, and were required by the laws of the United States to carry his shipment under the initial contract. This being true, how could the Trial Judge hold as *a matter of law* that Respondent relied upon the conduct and representations of Petitioners, when, at best, the question is one of fact for the jury to pass upon? If this issue had been submitted to the jury, and the said jury had been instructed that Respondent was charged with knowledge, as a matter of law, that Petitioners were the agents of the initial carrier, and were required by the laws of the United States to carry the shipment under the initial contract, the jury could have determined that Respondent did not rely upon the refusal of Petitioners to carry the shipment upon the initial contract, but that Respondent voluntarily entered into the subsequent contracts with the Petitioners putting no reliance upon their statements that they would not carry the shipment under the initial contract, as they were by law, required to do.

Petitioners were deprived of a right and privilege arising from the terms of the initial contract, issued pursuant to the laws of the United States, by the action of the trial court in arbitrarily holding that they were estopped from setting up the terms of the

initial contract when as a matter of truth and fact, the question, at best, was one for the jury to pass upon.

ARGUMENT UPON PROPOSITION OF LAW
UNDER SECOND FEDERAL QUESTION.

Respondent pleaded:

"Said horses were reloaded at Big Springs, for further transportation about nine o'clock p. m., October 13th, 1913. If defendant, T. & P. Company and Katy Company, had exercised ordinary care to handle and transport said horses from Big Springs to Waco, they would have reached their destination within about 24 hours from the time they were reloaded at Big Springs and it would have been unnecessary to have again unloaded and fed them en route, yet so to do said defendants negligently and carelessly failed and refused. Instead of so doing, they gave said horses a very slow run, and negligently kept them confined in the car without food and water, and with no opportunity to rest for a continuous period of about 43 hours, whereby said horses were greatly injured and damaged and depreciated in value. The horses reached Waco and were unloaded there sometime during the afternoon or night of October 15, 1913, in very poor condition. Said defendants negligently failed to provide any facilities and to afford plaintiff any opportunity to unload, feed and rest said horses on the run from Big Springs to Waco." (Tr. p. 14, line 23, to p. 15, line 15).

Petitioners in reply, pleaded:

"If these defendants are mistaken as to the validity and effect of its contract and its provisions executed at Watrous, New Mexico, which has been pleaded heretofore, then, in the alter-

native, as to the pleas raised under said contract these defendants plead that at El Paso, Texas, the Texas & Pacific Railway Company and plaintiff's agent entered into a contract of shipment governing the transportation of plaintiff's horses from El Paso, Texas, to Fort Worth, Texas, en route to Waco; that one of the provisions of said contract executed at El Paso is as follows:

"Fourth. That said shipper, at his own risk and expense, is to take care of, feed, water and attend to said stock while the same may be in the stockyards of the carrier, or elsewhere, awaiting shipment, and while the same is being loaded, transported, unloaded and reloaded, and to load, unload, reload same at feeding and transfer points, and wherever the same may be unloaded and reloaded for any purpose whatever, and hereby covenants and agrees to hold said carrier harmless on account of any loss or damage to his stock while being so in his charge, and so cared for and attended to by him, or his agents or employes, as aforesaid, except such damages as may result from the negligence of the carrier.' This provision being reasonable as a matter of law.

"These defendants plead that it was the plaintiff's agent's duty to care for, feed and water the horses en route from El Paso, Texas, to Fort Worth, Texas, according to the provisions of said contract herein quoted, and that if said horses of plaintiff were damaged on account of the lack of feed and water, then said damage was due to the negligence of plaintiff's agent, for which these defendants are not liable; and this matter these defendants specially plead as a bar to plaintiff's recovery for any damages covered by the failure of plaintiff's horses to have feed and water." (Tr. p. 27, line 7, to p. 28, line 15).

Fred Crowder, a witness for Respondent, testified:

" * * * I went with these horses all the way from Watrous, New Mexico, to Waco, Texas. (S. F. p. 27, lines 11 to 13). * * * The horses were not fed properly from Big Springs, Texas, to Waco, Texas, and also were not watered between those points. They went, to my best recollection, for forty-two hours without feed or water." (Tr. p. 259, lines 10 to 14).

The contract containing said provision was introduced in evidence, but the Trial Judge refused to submit a charge to the jury upon the issue pleaded and proved by Petitioners. Similar provisions in shipping contracts have been upheld by the Texas Courts, and the decision of the Court of Civil Appeals at Fort Worth, Texas, is in conflict with the other Texas cases. In the late case of G. C. & S. F. vs. Winn Bros., 178 S. W. 698, Judge Hodges, speaking for the Court of Civil Appeals at Texarkana, said:

"In this state of the record it cannot be said, as a matter of law, that a stipulation whereby the shipper binds himself to accompany the stock and to water and feed them en route was unimportant and immaterial. In this instance the shippers were furnished with free transportation, presumably for the purpose of giving them an opportunity to have some one accompany the shipment and comply with the stipulation embraced in the contract. Article 714 of the Revised Statutes provides that common carriers shall feed and water live stock conveyed by them, unless otherwise provided by special contract. This seems to contemplate that contracts may be made whereby the carrier is relieved of that duty and responsibility. Contracts of this character have been upheld in this state as valid and binding obligations. Dick-

erson et al. vs. S. U. & G. Ry. Co., 170 S. W. 1045; Ft. W. & D. C. R. R. Co. v. Daggett, 87 Tex. 322, 28 S. W. 525; T. & P. R. R. Co. vs. Arnold, 16 Tex. Civ. App. 74, 40 S. W. 829; T. & P. R. R. Co. vs. Peters, 31 Tex. Civ. App. 6, 71 S. W. 71."

In the case of F. W. & D. C. R. R. Co. vs. Daggett, 87 Texas 328, the Supreme Court of Texas, speaking through Judge Denman, said:

"We are further of the opinion, that said courts erred in holding that by such delay and attempted rescission plaintiff was relieved of the duty of feeding and watering the stock, because the attempted rescission was ineffectual, and left the contract in full force, and because the Act of Congress, independent of any contract, imposed upon the person in charge of the stock the duty of feeding and watering same, of which duty he could not divest himself under the circumstances detailed in his testimony above, and his failure to perform such duty, when reasonable facilities were furnished by the carrier, was negligence chargeable to his principal. Rev. Stats. U. S., Sec. 4387.

"We are further of opinion, that the special contract, as well as said Act of Congress, relieved the carrier of the duty, in the first instance, of feeding and watering at such points as it furnished reasonable facilities to the shipper to do so, but that in the absence of such facilities at any point, the contract would be unreasonable as to such point, and the carrier would be liable for any damage resulting from the failure to feed and water at such point.

"We are further of the opinion that C. B. Daggett continued throughout the agent of plaintiff, and that his negligence was chargeable to plaintiff. If, however, it be conceded that C. B. Daggett abandoned the cattle and the service of plaintiff J. P. Daggett at Wichita

Falls and was no longer his agent, but became the agent of the carrier, then plaintiff J. P. Daggett was guilty of negligence in failing to make any arrangement to perform the duty of feeding and watering as required of him, both by the special contract and the statute above cited. While the agent C. B. Daggett might abandon the service of his master, he was powerless to relieve him of the duty imposed by the contract and the law. The failure to perform this duty was negligence. It can avail him nothing to show that the carrier was also guilty of negligence. We are of the opinion that there was error in holding that J. P. Daggett was not guilty of negligence in failing to feed and water the cattle at such places as the carrier provided reasonable facilities."

To like effect are the decisions of the Federal Courts. In the case of Webster vs. Union Pacific, 200 Federal 598, the Federal District Court of Colorado, in passing upon a provision in an interstate contract similar to the one we have under consideration here, said:

"2. The fourth defense sets up a special reduced rate of freight and a special contract of carriage, whereby the plaintiff shipper was to load, unload, reload, feed, water, tend, and care for the sheep at his own expense and risk during the entire transportation, and further alleges that any injuries suffered by the sheep were due to the carelessness of the plaintiff in and about such matters, and notwithstanding that proper facilities were provided by the defendant. It is not perceived why such an agreement would not be valid as between the shipper and the railroad company. Its terms do not contravene the provisions of Act, June 29, 1906, c. 3594, 34 Stat. 607 (U. S. Comp. St. Supp. 1911, p. 1341), known as the 'Twenty-Eight

Hour Law,' since that act in terms provides that the owner of the animals shall primarily be charged with feeding and watering them. While such a provision would not afford any defense to a prosecution by the government for failure of the railroad company, upon the owner's default, it is, as between the owner and the railroad, a sufficient defense, since it is tantamount to an allegation that railroad company was not itself negligent, but that the negligence was that of the owner of the animals in and about a matter as to which such owner had contracted to assume the sole responsibility. *Mo. Pac. Ry. Co. vs. Tex. & Pac. Co. (C. C.)* 41 Fed. 913."

And likewise in the case of *Missouri Pacific Ry. Co. vs. T. & P. Ry. Co.*, 41 Fed. 913, Judge Pardee, of the Fifth Circuit Court of Appeals, held:

"As there was a special contract in this case (1) that the cattle were to be fed and watered at Fort Worth; and (2) that the shipper was to take care of, feed, water, and attend to said stock; and as there is no evidence in the record or even pretense on the part of the intervenor, that he or his agent called on the carrier to stop for feed and water at any other place than at Fort Worth,—it would seem that the carrier is excused from responsibility for any damage resulting from the failure to feed and water the cattle between Pecos and Fort Worth."

Section 4386 of the Revised Statutes of the United States provides:

"No railroad company within the United States, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals are conveyed from one state to another,
 * * * shall confine the same in cars. * *
 for a longer period than twenty-eight consecutive hours, without unloading the same for rest,

water, and feeding, for a period of, at least, five consecutive hours, unless prevented from so unloading by storm or other accidental causes.

"One of the trains carrying intervenor's cattle went through to Fort Worth in less than 28 hours; one was over 28 hours. The cause for the delay is not apparent. It is easy to imagine, however, that it was the result of accident. If there had been no special contract between the parties, as authorized by the law of Texas in regard to this matter, it would seem that under the United States statute, above quoted, the carrier was in fault as to one of these trains, and that the fault resulted in damage; but considering the special contract, and the fact that the evidence is not sufficiently specific to enable the court to assess the damage arising from failure to feed and water, I am of the opinion that the intervenor can take nothing on that score."

This issue raised by the pleadings and evidence should have been submitted to the jury, and the trial Court in refusing so to do, deprived Petitioners of a privilege and right arising out of a contract issued in interstate commerce, and governed by the laws of the United States.

CONCLUSION.

In the Prescott case, 240 U. S. 633, this Court held:

"And as the terminal services incident to an interstate shipment are within the Federal Act, and the *conditions of liability*, while the goods are retained after notice of arrival, *are stipulated in the bill of lading under the filed regulations*, THE CONDITIONS THUS FIXED ARE CONTROLLING AND THE PARTIES CANNOT SUBSTITUTE THEREFOR A SPECIAL AGREEMENT. THE TRANSAC-

TION AT MOST COULD NOT BE DEEMED TO ACCOMPLISH MORE THAN IF THE PARTIES HAD AGREED THAT UNTIL SUCH DELIVERY THE GOODS SHOULD BE HELD UNDER A SPECIAL CONTRACT—IN LIEU OF THE PRESCRIBED CONDITIONS, AND THIS THEY COULD NOT EFFECT WITHOUT VIOLATING THE ACT WHICH GOVERNED THE SHIPMENT."

In the Blish Milling case, 241 U. S. 190, this Court held:

"But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms. It is urged, however, that the carrier in making the mis-delivery converted the flour and thus abandoned the contract. BUT THE PARTIES COULD NOT WAIVE THE TERMS OF THE CONTRACT UNDER WHICH THE SHIPMENT WAS MADE PURSUANT TO THE FEDERAL ACT; NOR COULD THE CARRIER BY ITS CONDUCT GIVE THE SHIPPER THE RIGHT TO IGNORE THOSE TERMS WHICH WERE APPLICABLE TO THAT CONDUCT, AND HOLD THE CARRIER TO A DIFFERENT RESPONSIBILITY FROM THAT FIXED BY THE AGREEMENT MADE UNDER THE PUBLISHED TARIFFS AND REGULATIONS. A DIFFERENT VIEW WOULD ANTAGONIZE THE PLAIN POLICY OF THE ACT AND OPEN THE DOOR TO THE VERY ABUSES AT WHICH THE ACT WAS AIMED."

In the Ward case, decided by this Court June 4, 1917, Ad. Sheet Supreme Ct. Rep. July 15, 1917, page 619, this Court held:

*"The liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading. The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. THE TERMS OF THE ORIGINAL BILL OF LADING WERE NOT ALTERED BY THE SECOND, ISSUED BY THE CONNECTING CARRIER. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, THE ACCEPTANCE BY THE SHIPPER OF THE SECOND BILL WAS WITHOUT CONSIDERATION AND WAS VOID. The railway companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record discloses no evidence of intention to make such a waiver, and there was no consideration for it. Furthermore, as stated in Georgia, F. & A. Ry. Co. vs. Blish Mill Co., 241 U. S. 190, 'the parties could not waive the terms of the Contract under which the shipment was made pursuant to the Federal Act. * * * A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed.'"*

The Supreme Court of Texas, two of the Courts of Civil Appeals of Texas, and the Supreme Court of the United States having favorably passed upon the first and second propositions of law under the first Federal question, as well as the proposition of law under the second Federal question raised by Petitioners in their application for a Writ of Certiorari, we earnestly request this Honorable Court to grant the relief prayed for by Petitioners in order that the judgment of the lower court, which is in direct con-

flict with the decisions hereinbefore enumerated,
may be reviewed and corrected.

Respectfully submitted,

GEORGE THOMPSON,

J. H. BARWISE, JR.,

Solicitors for Petitioners.

George Thompson
Of Counsel.

AUTHORITIES.

(a) Holding that the validity of any stipulation in a contract issued by an initial carrier in any interstate shipment involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed is a Federal question to be determined under the general common law, and as such, is withdrawn from the field of State law or legislation:

Adams Express Co. vs. Croninger, 226 U. S. 491.

M., K. & T. Ry. Co. vs. Harriman, 227 U. S. 657.

Georgia Ry. Co. vs. Blish Milling Co., 241 U. S. 190.

(b) Holding that the liability of any carrier in the route over which the articles were routed, for loss or damage on an interstate shipment is that imposed by the Carmack Amendment, as measured by the original contract of shipment, so far as it is valid under said act:

M., K. & T. Ry. Co. vs. Harriman, 227 U. S. 657.

K. C. S. Ry. Co. vs. Carl, 227 U. S. 639.

Adams Exp. Co. vs. Croninger, 226 U. S. 491.

No. Pac. Ry. Co. vs. Wall, 241 U. S. 87.

Southern Ry. Co. vs. Prescott, 240 U. S. 633.

C. B. & Q. Ry. Co. vs. Miller, 226 U. S. 513.

Chicago Ry. Co. vs. Latta, 226 U. S. 519.

Atlantic Coast Line vs. Riverside Mills, 219 U. S. 186.

G., H. & S. A. Ry. Co. vs. Wallace, 223 U. S. 481.

N. & W. Ry. Co. vs. Tobacco Co., 228 U. S. 593.

C. C. C. & St. L. Ry. Co. vs. Dettlebach, 239 U. S. 588.

N. Y., P. & N. Ry. Co. vs. Produce Co., 240 U. S. 34.

G. F. & A. Ry. Co. vs. Blish Milling Co., 241 U. S. 190.

Hudson vs. Chicago Ry. Co., 226 Fed. 38.

American Exp. Co. vs. United States Horse Shoe Co., Vol. 37, Sec. 15, Adv. Sheets, Sup. Ct. Rep., July 1, 1917, p. 595.

(c) Holding that a stipulation contained in a bill of lading issued by the initial carrier upon an interstate shipment to the effect that any suit for loss and damages to the shipment while being transported by the initial carrier and the connecting carriers must be filed within ninety days next after said loss or damage occurred is a reasonable stipulation as a matter of law:

M., K. & T. Ry. Co. vs. Harriman, 227 U. S. 657.

(d) Holding that the initial contract upon an interstate shipment is the only valid contract covering said shipment and a contract made en route by an intermediate or connecting carrier is without consideration and void:

M., K. & T. Ry. Co. vs. Ward, 169 S. W. 1035.

A. T. & S. F. Ry. Co. vs. Word, 159 S. W. 375.

C. R. I. & G. Ry. Co. vs. Scott, 156 S. W. 294.

N. Y. P. & N. Ry. Co. vs. Produce Co., 240 U. S. 34.

G. F. & A. Ry. Co. vs. Blish Milling Co., 241 U. S. 190.

No. Pac. Ry. Co. vs. Wall, 241 U. S. 87.

U. S. Compiled Statutes, Section 8592, Sub. 11; Section 8583, Sub. 5.

M., K. & T. Ry. Co. vs. Ward, Adv. Sheet Sup. Ct. Rep., date July 15, 1917, p. 619.

(e) Holding that a person can never be estopped by an act that is illegal and void:

10 Ruling Case Law, pp. 742 and 801.
 Lowe vs. Daniels, 61 Am. Dec. 448.
 I. C. Ry. Co. vs. Henderson, 226 U. S. 441.
 T. & P. Ry. Co. vs. Mugg, 202 U. S. 242.
 G. C. & S. F. Ry. Co. vs. Hefley, 158 U. S. 98.

(f) Holding that recitals in bills of lading signed by a carrier and shipper at lawful alternate rates, based on valuation constitute admission by shipper and prima facie evidence of choice of rates casts upon the shipper the burden of proof to contradict his own admissions:

C. N. O. & P. Ry. Co. vs. Rankin, 241 U. S. 319.

(g) Holding that one is not estopped from asserting the illegality of a contract:

Burk vs. Abbott, 54 S. W. 314.
 Pittsburg Const. Co. vs. Westside Belt Co.,
 151 Fed. 125.
 E. E. Taenzer vs. C. R. I. & P., 191 Fed. 543.

(h) That it is unlawful for a carrier to grant any person or corporation any privilege or advantage or discrimination in interstate commerce:

Hocking Valley Ry. Co. vs. U. S., 210 Fed. 737.
 C. & A. Ry. Co. vs. Kirby, 225 U. S. 165.
 New Haven R. R. Co. vs. I. & C., 200 U. S. 403.
 Armour & Co. vs. U. S., 209 U. S. 57.
 L. & N. Ry. Co. vs. Motley, 219 U. S. 467.
 U. S. vs. Union Stock Yards, 226 U. S. 307.

(i) Parties can not waive the terms of a contract under which a shipment is made pursuant to the Federal Act, nor can the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier

to a different responsibility than that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the Act was aimed :

C. & A. Ry. Co. vs. Kirby, 225 U. S. 153.

G. F. & A. Ry. Co. vs. Blish Milling Co., 241 U. S. 190.

M., K. & T. Ry. Co. vs. Ward, Adv. Sheet Sup. Ct. Rep., date July 15, 1917, p. 619.

(j) Holding that a provision in a livestock contract to the effect that the shipper's agent who accompanied the shipment shall unload, reload, feed, water and rest the horses while in transit, is a valid provision in the event it is shown and the jury believes that reasonable facilities were afforded by the carrier, to the shipper's agent for the performance of these duties.

T. B. & H. Ry. Co. vs. Montgomery, 16 S. W. 178.

G., C. & S. F. Ry. Co. vs. Williams, 23 S. W. 626.

T. & P. Ry. Co. vs. Davis, 40 S. W. 167.

H. & T. C. Ry. Co. vs. Brown, 85 S. W. 44.

St. L. S. W. Ry. Co. vs. Musick, 80 S. W. 673.

M., K. & T. Ry. Co. vs. Clark, 79 S. W. 827.

T. & P. Ry. Co. vs. Byers, 73 S. W. 427.

St. L. S. W. Ry. Co. vs. Hunt, 81 S. W. 322.

Ft. W. & D. C. Ry. Co. vs. Daggett, 87 Tex. 322.

Dickerson vs. Ry. Co., 170 S. W. 1045.

G., C. & S. F. Ry. Co. vs. Winn, 178 S. W. 697.

Revised Statutes, Article 714.

M., K. & T. Ry. Co. vs. Harriman, 227 U. S. 657.

P. & N. T. Ry. Co. vs. Morrison, 169 S. W. 1098.

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In the Supreme Court of the United States
OCTOBER TERM, 1918.

TEXAS & PACIFIC RAILWAY COMPANY
and MISSOURI, KANSAS & TEXAS RAIL-
WAY OF TEXAS, *Petitioners,*

vs.

B. LEATHERWOOD, *Respondent,*

No. 249.

*Appeal from the Court of Civil Appeals for the Sec-
ond Supreme Judicial District of the
State of Texas.*

BRIEF FOR PETITIONERS

STATEMENT OF CASE.

In this case a petition for certiorari was filed in this Court on August 18, 1917, and this Court entered an order granting same on October 15, 1917.

The following four questions are presented:

1. Is a provision reasonable that is contained in the initial contract required to be executed by the initial carrier on through transportation of an interstate shipment under the Federal laws as they existed in 1913, to the effect that shipper's failure to bring a suit within six months after the loss or damage occurs on the shipment would be a bar to the shipper's recovery?

2. Is the initial contract required to be executed by the initial carrier on through transportation of an interstate shipment, the only legal, valid, and binding contract that can be made under the Interstate Commerce Act, and are all subsequent contracts made by connecting carriers with the shipper, on an interstate shipment, and after the initial contract has been signed by the carrier and shipper at the point of origin without consideration, illegal and void?

3. Can the shipper successfully urge the plea of estoppel, thereby preventing connecting carriers from claiming any benefits under the provisions of the initial contract executed by the initial carrier, when said connecting carriers refuse to carry the shipment under the initial contract so issued by the initial carrier for through transportation, and demand the execution of new contracts between the shipper and themselves?

4. If this plea of estoppel is available to the shipper, is it not a matter for the jury to determine whether or not the shipper relied upon the action and conduct of the connecting carriers to his consequent injury and damage, or is the trial Court entitled to assume such to be a fact?

These questions arise by reason of the fact that on March 2, 1915, Respondent, B. Leatherwood, filed suit in the County Court of Tarrant County, Texas, for Civil Cases, against Petitioners, Texas & Pacific Railway Company, and the Missouri, Kansas & Texas Railway Company of Texas, for Five Hundred Twenty (\$520.00) Dollars for alleged damages to a shipment of horses made by him from Watrous, New Mexico, to Waco, Texas, on or about October 9, 1913,

over the lines of railway of the Santa Fe, Texas & Pacific Railway Company, and Missouri, Kansas & Texas Railway Company of Texas.

Petitioners herein defended in said suit, pleading as a bar to Respondent's right of recovery the failure of Respondent to comply with a provision in the bill of lading issued by the initial carrier, the Santa Fe Railway Company, governed by the laws of the United States regulating interstate commerce, and signed by Respondent, to the effect that any suit for loss or damage to the shipment of horses covered by said bill of lading, should be brought within six months after same occurred, else said suit would be barred; said suit not having been instituted by the Respondent until more than sixteen months after the loss or damage occurred. (Tr. pp. 11-12.)

Respondent in replying to Petitioners pleadings, answered that Petitioners were estopped from setting up the benefit arising from the initial contract, in that they refused to carry the shipment under said contract, and required Respondent to sign new contracts, which Respondent further alleged could not be invoked by Petitioners because same were obtained under duress. (Tr. pp. 21-22.)

On December 22, 1915, the case was tried in the County Court for Civil Cases, and Petitioners at the close of the evidence, requested that the court peremptorily instruct the jury to return a verdict in favor of Petitioners, for the reason that the undisputed evidence showed that Respondent had failed to comply with the provision in the initial contract, to the effect that suit for loss or damage on said shipment should be brought within six months after same occurred, else same would be barred. (Tr. pp.

28-29). This request of the the court was refused by the trial judge, and exception was taken by Petitioners, (Tr. pp. 85-88) and questions of negligence were submitted to the jury by the trial judge, he assuming that as a matter of law Petitioners were estopped from claiming the benefit of said provision contained in said initial contract, by reason of their conduct in refusing to carry the shipment under the terms of the initial contract, and demanding execution of new contracts between themselves and Respondent. (Tr. pp. 24-29). Petitioners reserved a bill of exception to the action of the trial court in assuming that the plea of estoppel was good, and in not submitting same to the jury for its determination; and thereupon, (Tr. Sec. 164, p. 84) the case having been submitted to the jury, a verdict was returned by said jury, (Tr. p. 37) and a judgment was rendered for Respondent against the Texas & Pacific Railway for \$280.25, (Tr. p. 39) and against the Missouri, Kansas & Texas Railway of Texas, for \$56.05. (Tr. pp. 39-41.)

Petitioners perfected an appeal to the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, Texas, and on February 24, 1917, after said cause had been submitted before said court, the said judgment rendered in the trial court was in all respects affirmed by the said Court of Civil Appeals, a written opinion being handed down. (Tr. pp. 206-208).

On March 9, 1917, Petitioners herein filed their motion for rehearing of said cause before said Court of Civil Appeals; (Tr. pp. 161-200) and on the 5th day of April, 1917, filed their motion before said court, requesting certain questions before the court

be certified to the Supreme Court of Texas for answer; (Tr. pp. 203-206) both of which said motions were overruled on the 2d day of June, 1917. (Tr. p. 209).

The action of the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas, being final, no appeal from said court to the Supreme Court of Texas being permissible under the laws of Texas, in a case originating in the County Court, Petitioners applied on August 18, 1917, to this Honorable Court for a writ of certiorari, which was granted by this court on October 15, 1917. This case is therefore now properly before this Honorable Court for final determination.

FIRST SPECIFICATION OF ERROR.

The provision in the initial contract issued by the initial carrier at Watrous, New Mexico, pursuant to the Federal Act as it existed in 1913 and covering the through transportation of shipper's horses to Waco, Texas, and specifying that any suit for loss or damage to said shipment of horses must be brought within six months else same would be barred, was and is a valid and reasonable provision under the laws of the United States; and Petitioners herein having pleaded said initial contract and said provision therein as aforesaid, as well as the laws of the United States and rate governing same; and the undisputed evidence showing that said suit was not brought until more than sixteen months after the alleged loss and damage occurred, the trial court should have rendered judgment in favor of Petitioners herein, and such relief having been refused by the trial court, and it being called to the attention

of the Court of Civil Appeals of Texas, the said Court of Civil Appeals should have granted such relief to Petitioners herein, which it refused to do. And the act of said court is erroneous and is in direct conflict not only with decisions of the Supreme Court of Texas, but also those of the Supreme Court of the United States, particularly that of the M., K. & T. vs. Harriman, 227 U. S. 657.

SECOND SPECIFICATION OF ERROR.

The initial contract issued by the initial carrier at Watrous, New Mexico, pursuant to the Federal Act, and covering the through transportation of Respondent's horses from Watrous, New Mexico, to Waco, Texas, under the laws of the United States was the only valid and legal contract that could be made by Respondent with any of the carriers handling his horses en route from Watrous, New Mexico, to Waco, Texas; and even though Petitioners herein, after receiving Respondent's horses from the initial carrier, the Santa Fe lines, at El Paso, Texas, required Respondent to sign one of their contracts which contained terms different from those of said initial contract, still said subsequent contracts were without consideration and were illegal and void under the laws of the United States, commonly known as the Hepburn Act, and the Carmack Amendment; and the subsequent carriers of Respondent's horses, could not be estopped from asserting the provisions of the initial contract executed at Watrous, New Mexico, by reason of their conduct in requiring Respondent to sign the subsequent contracts at El Paso and at Fort Worth, which were illegal, invalid, void and without consideration. Such being the case, and Petitioners having pleaded a provision in the initial

contract requiring suit to be brought within six months after the loss or damage occurred, and Respondent's failure to comply with said provision, and that the laws of the United States governed said shipment, same being interstate in its nature, the trial court should have rendered judgment for Petitioners inasmuch as they could not be estopped from setting up the benefits as aforesaid derived from the terms of the initial contract by reason of their illegal and void acts in requiring Respondent to enter into subsequent contracts with them which were void and illegal, and without consideration and the trial court having refused such relief the Court of Civil Appeals of Texas should have afforded such relief to Petitioners herein; and the act of said Court in refusing such relief is erroneous and is not only in direct conflict with the decisions of the Courts of Texas, but also those of the Supreme Court of the United States, particularly those of *So. R. vs. Prescott*, 240 U. S. 633; *G. F. & A. Ry. vs. Blish Milling Co.*, 241 U. S. 190, and *M. K. & T. vs. Ward*, 244 U. S. 383.

THIRD SPECIFICATION OF ERROR.

Respondent herein, the shipper of the horses, having pleaded that Petitioners herein, the connecting carriers handling Respondent's shipment, were estopped from claiming the benefits of the initial contract executed at Watrous, New Mexico, and covering the through transportation of Respondent's horses from Watrous, New Mexico, to Waco, Texas; yet, even though under the laws of the United States the subsequent contracts made at El Paso, Texas, and Fort Worth, Texas, were not illegal, invalid and void, and the plea of estoppel could be invoked, the

trial Court should not have assumed, as a matter of fact, that Respondent, to his consequent damage, relied upon the action of the subsequent carriers in refusing to carry his horses under the initial contract and requiring new contracts to be entered into, but said issue should have been submitted to the jury as a question of fact upon Respondent's plea of estoppel and the Court of Civil Appeals of Texas erred in not so holding, and Petitioners herein have been deprived of having the jury pass upon a question of fact claimed and arising out of the terms of the initial contract issued at Watrous, New Mexico; and have, therefore, been deprived of a right and privilege derived from a statute of the United States.

ARGUMENT.

We respectfully present our argument under five heads, which we will discuss in their respective order:

I.

THIS COURT HAS JURISDICTION IN THIS CASE.

Section 237 of the Judicial Code, as amended September 6, 1916, provides in part as follows:

"It shall be competent for the Supreme Court, by certiorari or otherwise, to require that there be certified to it for review and determination with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could

be had, * * * where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is either in favor of, or against the title, right, privilege or immunity especially set up or claimed by either party under such Constitution, treaty, statute, commission, or authority."

This appeal is from a final judgment rendered by the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas, which is the highest court of Texas to which a decision could be had. This is true for the reason that the Supreme Court of Texas has held in the case of *Cole vs. State of Texas*, 106 Texas 472, that there can be no appeal to the Supreme Court of Texas from a decision of the Court of Civil Appeals of a case which originates in the County Court. The case at bar originated in the County Court of Tarrant County, Texas, for Civil Cases.

The foregoing being true, it is therefore necessary to determine three propositions in their respective order.

1. In this case, is there a right claimed under a statute of the United States?

In the case of *Adams Express Co. vs. Croninger*, 226 U. S. 491, Mr. Justice Lurton said:

"The answer relies upon the Act of Congress of June 29, 1906, being an act to amend the Interstate Commerce Act of 1887, as the only regulation applicable to

an interstate shipment and avers that the limitation of value, declared in its bill of lading, was valid and obligatory under that Act. This defense was denied. This constitutes the Federal question and gives this Court jurisdiction."

In the case of *M., K. & T. vs. Harriman*, 227 U. S. 657, Mr. Justice Lurton said:

"As the transaction was an interstate shipment the case comes here upon questions which involve the validity of certain provisions in the contract of shipment when tested by the twentieth section of the Act to Regulate Commerce, as amended by the Act of June 29, 1906."

In the case of *Georgia-Florida Ry. Co. vs. Blish Milling Co.*, 241 U. S. 190, Mr. Justice Hughes said:

"These decisions also establish that the question as to the proper construction of the bill of lading is a Federal question."

In the case of *Railway Company vs. Starbird*, 243 U. S. 592, Mr. Justice Day said:

"As the shipment in this case was interstate, there can be no question that, since the decision in the *Croninger Case*, *supra*, the parties are held to the responsibilities imposed by the Federal law, to the exclusion of all other rules of obligation. Since the Carmack Amendment, the carrier in this case is liable only under the terms of that Act of Congress, and the action against it to recover on a through bill of

lading for the negligence of connecting carriers as well as of itself, was founded on that Amendment. *Atlantic Coast Line R. R. Co. vs. Riverside Mills*, 219 U. S. 186, 196.

"This principle has been so frequently recognized in the recent decisions of this Court that it is only necessary to refer to some of them. In *Southern Railway Co. vs Prescott*, 240 U. S. 632, 636, 639, this Court said: 'As the shipment was interstate, and the bill of lading was issued pursuant to the Federal Act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. * * * Viewing the contract set forth in the bill of lading as still in force, the measure of liability under it must also be regarded as a Federal question. As it has often been said, the statutory provisions manifest the intent of Congress that the obligation of the carrier with respect to the services within the purview of the statute shall be governed by uniform rule in the place of the diverse requirements of State legislation and decisions.'

"In *Southern Express Company vs. Byers*, 240 U. S. 612, 614, this Court said:

" 'Manifestly the shipment was interstate commerce; and, under the settled doctrine established by our former opinions, rights and liabilities in connection therewith depend upon Acts of Congress, the bill of lading and common law principles

accepted and enforced by the Federal courts.'

"To the same effect, Northern Pacific Ry. Co. vs. Wall, 241 U. S. 87, 91, 92; Georgia, Florida & Alabama Ry. Co. vs. Blish Milling Co., 241 U. S. 190; Cincinnati, New Orleans & Texas Pacific Ry. Co. vs. Rankin, 241 U. S. 319."

2. Was said right sufficiently set up and called to the attention of the State court within the meaning of the Act?

Petitioners in their first amended original answer, upon which trial was had, especially set up the provision in the initial contract requiring suit to be brought within six months after the loss or damage occurred else same would be barred, and further pleaded that the initial contract was issued on an interstate shipment, and as such, was and is subject to the laws of the United States governing interstate commerce. (Tr. pp. 11-12, par. 6.) Petitioners at the close of the evidence, requested the Court to instruct the jury to return a verdict in their favor, for the reason that suit was not filed by Respondent within the six months' period as specified in the initial contract, which request was refused by the Court, and proper exception taken by Petitioners. (Tr. pp. 28-29.) In the Court of Civil Appeals of Texas, wherein final judgment was rendered, Petitioners in their motion for rehearing again urged the error of the Court in refusing to recognize the validity of said provision in the initial contract requiring suit to be brought within six months. (Tr. pp. 161-162.)

3. Was the decision against the right set up or claimed under the Federal statute?

The trial Court refused to recognize the validity of the provision in the initial contract requiring suit to be brought within six months (Tr. p. 29), and the Court of Civil Appeals of Texas did likewise. (Tr. p. 209.) The action of the Court of Civil Appeals in overruling Petitioners' motion for rehearing (Tr. p. 209) was a decision against the right set up and claimed by Petitioners under the Federal statute.

II.

THE PROVISION IN THE INITIAL CONTRACT ISSUED IN 1913 REQUIRING SUIT FOR LOSS OR DAMAGE TO BE BROUGHT WITHIN SIX MONTHS AFTER SAME OCCURRED ELSE SAME WOULD BE BARRED, IS A REASONABLE STIPULATION.

The initial contract which contained the provision requiring suit to be brought within six months was entered into by and between the Santa Fe Railway, the initial carrier, and Respondent, on October 9, 1913 (Tr. pp. 116-118), Respondent's shipment of horses leaving Watrous, New Mexico, on October 9, 1913, and arriving at Waco, Texas, on October 15, 1913, during which time the alleged injuries occurred. By reason of these facts the rights of the parties hereto must be determined by the laws of the United States governing interstate commerce as they existed at the time the contract was made and the shipment moved, to-wit: in October, 1913. We make this preliminary statement for the reason that subsequently Congress, by the Act of March 4, 1915, C. 176, 38 Stat. 1196, amended the laws as

they existed in October, 1913, by providing as follows:

"It shall be unlawful for any such common carrier to provide by rule, contract, regulation or otherwise, a shorter period * * * for the institution of suits than two years."

The rights of the parties hereto are not affected by this subsequent amendment enacted by Congress of date March 4, 1915. This point being made clear, we pass to the question of showing what the decisions of this Court were concerning the reasonableness of the provision in the contract issued by the initial carrier in 1913, which contained the following provision:

"Ninth. It is further agreed that no suit or action against the company for the recovery of any damages accruing or arising out of said shipment or of any contract pertaining to the same, or to the furnishing of facilities for such shipment, shall be sustained in any court of law or equity unless such suit or action shall be commenced within six months next after the loss or damage shall have occurred. The failure to institute suit within said time shall be deemed conclusive evidence against the validity of such claim or cause of action, and shall be a complete bar to such suit. * * *"
(Tr. p. 118, Sections 234-35.)

In the case of M., K. & T. Ry. vs. Harriman, 227 U. S. 657, Mr. Justice Lurton said:

"The Court below held that the stipulation in the shipping contract that no suit shall be brought after the lapse of ninety days from the happening of any loss or damage, 'no statute or limitation to the contrary notwithstanding,' was that * * * the policy of statutes of limitation is to encourage promptness in the bringing of actions that the parties shall not suffer by loss of evidence from death or disappearance of witnesses, destruction of documents, or failure of memory. But there is nothing in the policy or object of such statutes which forbids the parties to an agreement to provide a shorter time, provided the time is not unreasonably short. That is a question of law for the determination of the Court. * * * Before the Texas and Missouri statutes forbidding such special contracts, short limitations in bills of lading were held to be valid and enforceable. The provision requiring suit to be brought within ninety days is not unreasonable."

In the case of Railway Company vs. Starbird, 243 U. S. 592, Mr. Justice Day said:

"The stipulation reads: 'Claims for damages must be reported by consignee, in writing, to the delivering line within thirty-six hours after the consignee has been notified of the arrival of the freight at the place of delivery. If such notice is not there given, neither this company nor any of the connecting or intermediate carriers shall be liable.' * * * We find nothing un-

reasonable in the stipulation concerning notice, and there was no attempt made to comply with it."

In the case of *M., K. & T. Ry. vs. Harriman*, *supra*, it was held by this Court that a stipulation in an initial contract that suit must be brought within ninety days, was reasonable as a matter of law. This being true, it stands to reason that a similar stipulation requiring suit to be brought within six months is likewise reasonable as a matter of law. We therefore pass on to other questions involved.

III.

THE INITIAL CONTRACT ISSUED BY THE INITIAL CARRIER PURSUANT TO THE FEDERAL ACT, IS THE ONLY LEGAL, VALID, AND BINDING CONTRACT THAT CAN BE MADE AND ANY SUBSEQUENT CONTRACTS MADE BY CONNECTING CARRIERS ARE WITHOUT CONSIDERATION, ILLEGAL, AND VOID.

In the case at bar, Respondent and Santa Fe Railway Company entered into a contract at the point of origin, Watrous, New Mexico, for the transportation of Respondent's horses through to Waco, Texas. The shipment of horses was carried from Watrous, New Mexico, to El Paso, Texas, by the Santa Fe Railroad, and there turned over to the Texas & Pacific Railway. The Texas & Pacific Railway at El Paso refused to carry the shipment under the original contract that had been issued at Watrous, New Mexico, and entered into a contract with Respondent for the transportation of Respondent's horses from El Paso to Fort Worth, Texas. Likewise, when the shipment of horses reached Fort Worth and were

delivered by the Texas & Pacific to the Missouri, Kansas & Texas Railway of Texas for transportation from Fort Worth to Waco, Texas, final destination, the Missouri, Kansas & Texas Railway of Texas refused to carry under the original contract that had been issued at Watrous, New Mexico, and entered into a contract with Respondent for the transportation of said horses over its line of railroad from Fort Worth to Waco. It is by reason of these circumstances that the questions involved herein arise, and we must therefore determine the relative rights of the parties under the contracts referred to.

In the case of Atlantic Coast Line vs. Riverside Mills, 219 U. S. 186, decided by this Court on January 3, 1911, Mr. Justice Lurton in a very exhaustive opinion fourteen pages in length, held that the initial carrier of an interstate shipment could not make a contract limiting its liability to loss and damage on its own line, the Carmack Amendment regulating interstate commerce contemplating that the initial carrier should issue a contract for the entire transportation, in order that uniformity of handling could be obtained. In this case Judge Lurton said:

"It is obvious, from the many decisions of this Court, that there is no such thing as absolute freedom of contract. Contracts which contravene public policy cannot be lawfully made at all, and the power to make contracts may in all cases be regulated as to form, evidence, and validity as to third persons. The power of government extends to the denial of liberty of contract to the extent of forbidding or regulating every contract which is reasonably calculated to

injuriously affect the public interests. Undoubtedly the United States is a government of limited and delegated powers, but in respect of those powers which have been expressly delegated, the power to regulate commerce between the States being one of them, the power is absolute except as limited by other provisions of the Constitution itself.

"That a situation had come about which demanded regulation in the public interest was the judgment of Congress. The requirement that carriers that undertook to engage in interstate transportation, and as a part of that business held themselves out as receiving packages destined to places beyond their own terminal, should be required as a condition of continuing in that traffic to obligate themselves to carry to the the point of destination, using the lines of connecting carriers as their own agencies, was not beyond the scope of the power of regulation. The rule is adopted to secure the right of the shipper by securing unity of transportation with unity of responsibility. The regulation is one which also facilitates the remedy of one who sustains a loss, by localizing the responsible carrier. Neither does the regulation impose an unreasonable burden upon the receiving carrier. The methods in vogue, as the Court may judicially know, embrace not only the voluntary arrangement of through routes and rate, but the collection of the single charge made by the carrier at one or the

other ends of the route. This involves frequent and prompt settlement of traffic balances. The routing in a measure depends upon the certainty and promptness of such traffic balance settlements, and such balances have been regarded as debts of a preferred character when there is a receivership. Again, the business association of such carriers affords to each facilities for locating the primary responsibility as between themselves which the shipper cannot have. These well-known conditions afford a reasonable security to the receiving carrier for a reimbursement of a carrier liability which should fall upon one of the connecting carriers as between themselves.

"If it is to be assumed that the ultimate power exerted by Congress is that of compelling co-operation by connecting lines of independent carriers for purposes of interstate transportation, the power is still not beyond the regulating power of Congress, since without merging identity of separate line or operation it stops with the requirement of oneness of charge, continuity of transportation and primary liability of the receiving carrier to the shipper, with the right of reimbursement from the guilty agency in the route.

"In substance Congress has said to such carriers, 'if you receive articles for transportation from a point in one State to a place in another, beyond your own terminal, you must do so under a contract to

transport to the place designated. If you are obliged to use the services of independent carriers in the continuation of the transit, you must use them as your own agents and not as agents of the shipper.' It is, therefore, not the case of making one pay the debt of another. The receiving carrier is, as principal, liable not only for its own negligence, but for that of any agency it may use, although, as between themselves, the company actually causing the loss may be primarily liable."

In the case of *Adams Express Company vs. Croninger*, 226 U. S. 499, in which there was involved the validity of a provision in the bill of lading limiting the carrier's liability to an agreed value of \$50.00, Mr. Justice Lurton held again that the effect of the Carmack Amendment was to supersede all legislation in the particular States, and to embrace the liability of the carrier in interstate transportation, and that such a provision in the bill of lading was valid.

Closely following the decision in the *Croninger* case, came the opinion of this Court in the case of *Kansas Southern Railway Company vs. Carl*, 227 U. S. 639, in which there was involved the question of whether or not the final carrier in the route was entitled to the benefit of a stipulation in an initial contract signed by the shipper, releasing the initial carrier and all subsequent carriers from any loss or damage in excess of \$5.00 per cwt. In discussing this case, Mr. Justice Lurton said:

"As the shipment was interstate, the contract was controlled by the twentieth sec-

tion of the Act of Congress of June 29th, 1909. The initial carrier under that provision of the Interstate Commerce Act, as an interstate carrier, holding itself out to receive shipments from a point upon its own line in one State to a point in another State upon the line of a succeeding and connecting carrier, came under liability not only for its own fault but also for loss or damage upon the line of a connecting carrier in the route: *Atlantic Coast Line vs. Riverside Mills*, 219 U. S. 186. Any stipulation in its own receipt was ineffective in so far as it was not authorized by the section of the Act referred to, whether intended for its own benefit or that of the succeeding carrier. It is true that any limitation of liability contained in its contract which would be valid in its own behalf would likewise inure to the benefit of its connecting carrier. The liability of any carrier in the route over which the articles were routed, for loss or damage, is that imposed by the Act as measured by the original contract of shipment so far as it is valid under the Act. This provision of the Interstate Commerce Act has been so fully considered and decided that we need not go further into the matter.

"That amendment undoubtedly manifested the purpose of Congress to bring contracts for interstate shipments under one uniform rule or law, and therefore, withdraw them from the influence of State regulation. *Adams vs. Croninger*, above cited.

Every such initial carrier is required 'to issue a receipt or bill of lading therefor' when it receives property for transportation from one State to another. Such initial carrier is made liable to the holder of such receipt for any loss or damage 'caused by it,' or by any connecting carrier in the route to whom it shall make delivery. It is then declared that no contract, receipt, rule, or regulation shall 'exempt' such a common carrier 'from the liability hereby imposed'."

In the case of *Cleveland, St. Louis Ry. Co. vs. Dettlebach*, 239 U. S. 588, this Court followed up the holding in the *Carl* case, *supra*, by holding that the terminal carrier on an interstate shipment was entitled to the benefit of the provision in the initial contract releasing the value of the goods in a shipment, although the goods were lost by the terminal carrier while in the capacity of a warehouseman.

The foregoing decisions were followed by several very important ones handed down by Mr. Justice Hughes. In the case of *N. Y. P. & N. Ry. Co. vs. Peninsula Produce Exchange of Maryland*, 240 U. S. 34, Justice Hughes said:

"We need not review at length the considerations which led to the adoption of this amendment. These were stated in the *Atlantic Coast Line vs. Riverside Mills*, 219 U. S. 186, 199, 293. It was there pointed out that along with singleness of rate and continuity of carriage in through shipments there had grown up the practice of

requiring specific stipulations limiting the liability of each separate company to its own part of the through route, and, as a result, the shipper could look to the initial carrier for recompense only 'for loss, damage, or delay,' occurring on its own line. This 'burdensome situation' was the 'matter which Congress undertook to regulate.' And it was concluded that the requirement that interstate carriers holding themselves out as receiving packages for destinations beyond their own terminal should be compelled, 'as a condition of continuing in that traffic to obligate themselves to carry to the point of destination, using the lines of connecting carriers as their own agencies,' was within the power of Congress. The rule, said the Court in defining the purpose of the Carmack Amendment, 'is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility.' And, again, we said in *Adams Express Company vs. Croninger*, 226 U. S. 491, that this legislation embraces 'the subject of the liability of the carrier under a bill of lading which he must issue.' The duty to issue a bill of lading and the liability thereby assumed are covered in full, and though there is no reference to the effect upon State regulation, it is evident that Congress intended to adopt a uniform rule and relieve such contracts from the diverse regulation to which they had been theretofore subject.' "

In the case of Southern Railway Company vs. Prescott, 240 U. S. 633, there was involved this question: When the shipment arrived at the point of destination the terminal carrier notified the consignee of the arrival of the boxes, thereupon the consignee paid the entire freight charges on same and took four of the thirteen boxes away with him and the other nine boxes were left with the terminal carrier under an agreement that the terminal carrier would keep them until the consignee had time to take them away. The remaining nine boxes were destroyed by fire. The terminal carrier pleaded a provision in the bill of lading issued by the initial carrier and the consignee took the position that there had been a delivery of the goods by the terminal carrier to the consignee, that the freight had been paid, and that the goods thereafter did not constitute part of the interstate shipment and that the loss of same by the terminal carrier was governed by the State law. In fact the Supreme Court of South Carolina took this position. In discussing this matter Justice Hughes said:

“As the shipment was interstate and the bill of lading was issued pursuant to the Federal Act, the question whether the contract thus set forth had been discharged was necessarily a Federal question. The reference, above quoted, to the concession in the trial court cannot be taken to mean that this Federal question was not raised, for, as we have seen, it was distinctly presented and pressed; but we assume that the ruling, in substance, was that the goods had arrived, that the consignee had paid the freight and signed a receipt for the

goods, and that the nine boxes had remained in the possession of the carrier under the permission given, as testified, by the carrier's agent. The question is whether this admitted transaction had the legal effect of discharging the contract governed by Federal law and of creating a new obligation governed by State law.

"It is also clear that with respect to the service governed by the Federal Statute the parties were not at liberty to alter the terms of the service as fixed by the filed regulations. This has repeatedly been held with respect to rates (*Texas & Pacific Ry. Co. vs. Mugg*, 202 U. S. 242; *Kansas Southern Ry. Co. vs. Carl*, 227 U. S. 639, 652; *Boston & Maine Ry. Co. vs. Hooker*, 233 U. S. 97, 112; *Louis. & Nas. Ry. Co. vs. Maxwell*, 237 U. S. 94), and the established principle applies equally to any stipulation attempting to alter the provisions as fixed by the published rules relating to any of the services within the purview of the Act. *Chicago & Alton Ry. Co. vs. Kirby*, 225 U. S. 155, 166; *Atchison, Topeka & Santa Fe vs. Robinson*, 233 U. S. 173, 181. This is the plain purpose of the statute in order to shut the door to all contrivances in violation of its provisions against preferences and discriminations. No carrier may extend 'any privileges or facilities,' save as these have been duly specified. And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability while the goods

are retained after notice of arrival are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling and the parties cannot substitute therefor a special agreement.

"It is apparent that there had been no actual delivery of the nine boxes. The payment of the freight had no greater efficacy than if it had been made in advance of the transportation. The giving of a receipt for the goods by the consignee did not alter the fact that they were still held by the railway company awaiting actual delivery. The transaction at most could not be deemed to accomplish more than if the parties had agreed that until such delivery the goods should be held under a special contract—in lieu of the prescribed conditions, and this they could not effect without violating the Act which governed the shipment. It could not be said, for example, that while under the filed regulations the railway company was to make a 'reasonable charge for storage' pending delivery that it could agree with a particular shipper or consignee, to hold gratuitously; nor could it alter the terms of its responsibility while the goods remained undelivered. The actual service in holding the goods continued and we must look to the bill of lading to determine the legal obligation attaching to that service."

We call the attention of this Court to the rule laid down by Judge Hughes:

That even though the parties to the

shipment had entered into a special contract in lieu of the prescribed conditions in the initial bill of lading, yet said subsequent contract would be a variation of the Act which governed the shipment.

In the case of Georgia, Florida & Alabama Railway Company vs. Blish Milling Company, 241 U. S. 190, which case was decided on May 8, 1916, Mr. Justice Hughes said:

"These decisions also establish that the question as to the proper construction of the bill of lading is a Federal question.

"There is, however, a further and controlling consideration. We are dealing with a clause in a bill of lading issued by the initial carrier. The statute casts upon the initial carrier responsibility with respect to the entire transportation. The aim was to establish unity of responsibility (*Atlantic Coast Line vs. Riverside Mills*, 219 U. S. 186, 199-203; *N. Y. P. & N. Ry. Co. vs. Peninsula Produce Exchange*, 240 U. S. 34, 38), and the words of the statute are comprehensive enough to embrace responsibility for all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation which, as defined in the Federal Act, includes delivery. It is not to be doubted that if, in the case of an interstate shipment under a through bill of lading, the terminal carriers make a misdelivery, the initial carrier is liable; and when it asserts in its bill of lading a provision requiring reasonable

notice of claims 'in case of failure to make delivery,' the fair meaning of the stipulation is that it includes all cases of such failure, as well as those due to misdelivery as those due to the loss of the goods. But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms. (*Kansas Southern Ry. vs. Carl*, *supra*; *Southern Railway vs. Prescott*, *supra*); and if the clause must be deemed to cover a case of misdelivery when the action is brought against the initial carrier, it must equally have that effect in the case of the terminal carrier which in the contemplation of the parties was to make the delivery. The clause gave abundant opportunity for presenting claims and we regard it as both applicable and valid.

"In this view, it necessarily follows that the effect of the stipulation could not be escaped by the mere form of the action. The action is in trover, but as the Court said, 'If we look beyond its technical denomination, the scope and effect of the action is nothing more than that of an action for damages against the delivery carrier.' (15 Ga. App. p. 147.) It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could

not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed. *Chi. & Alt. Ry. vs. Kirby*, 225 U. S. 153, 166; *Kansas Southern Ry. vs. Carl*, *supra*; *A. T. & S. F. Ry. vs. Robinson*, 233 U. S. 173, 181; *Southern Ry. vs. Prescott*, *supra*. We are not concerned in the present case with any question save as to the applicability of the provision, and its validity, and as we find it to be both applicable and valid, effect must be given to it."

We confidently assert that the foregoing decisions we have quoted, had they not been followed by any subsequent ones, would be decisive on the point involved in the case at bar. Happily, however, we do not have to rely upon our interpretation of these holdings, for this Court in its recent decision in the case of *M. K. & T. Ry. vs. Ward*, 244 U. S. 383, upon the very question involved in this suit, held favorably to our contentions. The *Ward* case is directly in point, and is on all fours to the case at bar. In rendering the decision in the *Ward* case, Mr. Justice Brandies said:

"Upon appeal by these defendants, the

Court of Civil Appeals of the Third Supreme Judicial District affirmed the judgment, on the ground that the liability of the connecting carriers must be governed by the provisions of the bill of lading issued by the initial carrier,—(which did not require a written claim in thirty days),—and that the second bill of lading was void under the Carmack Amendment. (169 S. W. 1035.) Upon denial of a petition for rehearing the case was brought here on writ of error.

“The purpose of the Carmack Amendment has been frequently considered by this Court. It was to create in the initial carrier unity of responsibility for the transportation to destination. *Atlantic Coast Line Ry. Co. vs. Riverside Mills*, 219 U. S. 186, 55 L. Ed. 167, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. Rep. 164; *Northern P. Ry. Co. vs. Wall*, 241 U. S. 87, 92, 60 L. Ed. 905, 907, 36 Sup. Ct. Rep. 493. And provisions in the bill of lading inconsistent with that liability are void. *Norfolk & W. Ry. Co. vs. Dixie Tobacco Co.*, 228 U. S. 593, L. Ed. 980, 33 Sup. Ct. Rep. 609. While the receiving carrier is thus responsible for the whole carriage, each connecting road may still be sued for damages occurring on its line; and the liability of such participating carrier is fixed by the applicable valid terms of the original bill of lading. The bill of lading required to be issued by the initial carrier upon an interstate shipment governs the entire transportation. The terms of the original bill of lading were not

altered by the second, issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void.

"The railway companies contend that while the Carmack Amendment makes the receiving carriers pay for all liability incurred by the connecting lines, the question of whether there is any such liability or not must be determined by reference to the separate contracts of each participating carrier, and not to the contract of the initial carrier alone. If, as contended, a shipper must, in order to recover, first file his 'verified claim' with the connecting carrier who caused the injury, as provided in a separate bill of lading issued by such carrier, the shipper would still rest under the burden of determining which of the several successive carriers was at fault. Such a construction of the Carmack Amendment would defeat its purpose, which was to relieve shippers of the difficult, and often impossible, task of determining on which of the several connecting lines the damage occurred. For the purpose of fixing the liability, the several carriers must be treated, not as independent contracting parties, but as one system; and the connecting lines become in effect mere agents, whose duty it is to forward the goods under the terms of the contract made by their principal, the initial

carrier. *Atlantic Coast Line Ry. Co. vs. Riverside Mills*, 219 U. S. 186, 206, 55 L. Ed. 167, 182, 31 L. R. A. (N. S.) 7, 31 Sup. Ct. 164; *Galveston, H. & S. A. Ry. Co. vs. Wallace*, 223 U. S. 481, 56 L. Ed. 516, 523, 32 Sup. Ct. Rep. 205.

"The railway companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record discloses no evidence of intention to make such a waiver and there was no consideration for it. Furthermore, as stated in *Georgia, F. & A. R. Co. vs. Blish Mill Co.*, 241 U. S. 190, 197, 60 L. Ed. 948, 952, 36 Sup. Ct. Rep. 541, 'the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act * * *. A different view would antagonize the plain policy of the act and open the door to the very abuses at which the act was aimed.'

"Judgment affirmed."

It must be admitted that the decisions of this Court in the *Prescott* case, 240 U. S. 633; *Blish Milling* case, 241 U. S. 190; and the *Ward* case, 244 U. S. 383, absolutely establish the law as contended for by Petitioners, for as stated by Mr. Justice Brandies in the *Ward* case, *supra*:

"The liability of such participating carrier is fixed by the applicable, valid terms of the original bill of lading. The bill of lading required to be issued by the initial

carrier upon an interstate shipment, governs the entire transportation. The terms of the original bill of lading were not altered by the second, issued by the connecting carrier. As appellants were already bound to transport the cattle at the rate and upon the terms named in the original bill of lading, the acceptance by the shipper of the second bill was without consideration and was void."

Applying the language of Justice Brandies to the facts involved in the case at bar, it therefore must be established that the original bill of lading issued by the Santa Fe lines at Watrous, New Mexico, and signed by Respondent, was the contract that governed the entire transportation of Respondent's horses from Watrous, New Mexico, to Waco, Texas; and the terms of the original bill of lading were not altered by the second issued by the connecting carrier, Texas & Pacific at El Paso, Texas, or the third, issued by the connecting carrier, Missouri, Kansas & Texas Railway of Texas at Fort Worth, for the reason that the connecting carriers, Petitioners herein, were already bound to transport Respondent's horses at the rate and upon the terms named in the original bill of lading, and the second and third bills of lading so issued, were without consideration and were void. This conclusion leaves only one further question in connection with the validity of this stipulation, to be decided, the decision of which is necessarily involved in the question that we have heretofore been discussing. It is set out under the following head:

IV.

SUBSEQUENT CARRIERS CANNOT BE ESTOPPED EITHER BY THEIR SUBSEQUENT CONTRACT OR BY THEIR CONDUCT, FROM CLAIMING THE BENEFITS OF PROVISIONS CONTAINED IN THE INITIAL CONTRACT OR BILL OF LADING ISSUED BY THE INITIAL CARRIER OF AN INTERSTATE SHIPMENT PURSUANT TO THE FEDERAL ACT.

To prove the correctness of the statement under discussion, we need only to direct the Court's attention to the language used by this Court in deciding the Prescott, Blish Milling, and Ward cases, which has heretofore been set out in our argument.

In the Prescott case, 240 U. S. 633, this Court held:

"And as the terminal services incident to an interstate shipment are within the Federal Act, and the conditions of liability, while the goods are retained after notice of arrival, are stipulated in the bill of lading under the filed regulations, the conditions thus fixed are controlling and the parties cannot substitute therefor a special agreement. The transaction at most could not be deemed to accomplish more than if the parties had agreed that until such delivery the goods should be held under a special contract—in lieu of the prescribed conditions, and this they could not effect without violating the Act which governed the shipment."

In the Blish Milling case, 241 U. S. 190, this Court held:

"But the provision in question is not to be construed in one way with respect to the initial carrier and in another with respect to the connecting or terminal carrier. As we have said, the latter takes the goods under the bill of lading issued by the initial carrier, and its obligations are measured by its terms. It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore those terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed."

In the Ward case, 244 U. S. 383, this Court held:

"The railway companies also contend that the acceptance of the second bill of lading operated as a waiver of all rights thereafter accruing under the first. The record discloses no evidence of intention to make such a waiver, and there was no consideration for it. Furthermore, as stated in *Georgia, F. & A. Ry. Co. vs. Blish Mill*

Co., 241 U. S. 190, 'the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act. * * * A different view would antagonize the plain policy of the Act, and open the door to the very abuses at which the Act was aimed.' "

These three cases, in our opinion, establish beyond any doubt the correctness of the proposition that we have advanced, that Petitioners could not be estopped from claiming the benefit of the provision in the initial bill of lading issued at Watrous, New Mexico, and signed by Respondent, to the effect that Respondent must bring suit for loss or damage on said shipment within six months after same occurred else it would be barred, either by their subsequent agreements contained in the Texas & Pacific contract that was issued at El Paso, and the Missouri, Kansas & Texas Railway of Texas contract issued at Fort Worth, or by their conduct in refusing to carry under the terms of the initial contract issued at Watrous, New Mexico, for the very reason stated in the opinion rendered by this Court in the Blish Milling case, *supra*, to-wit:

"The parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore those terms which were applicable to that conduct, and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the

plain policy of the Act and open the door to the very abuses at which the Act was aimed."

We have assigned one further error of the Court, which, in our opinion, is not material to the disposition of the case for the reason that under the foregoing decisions Respondent was not entitled to recover by reason of his plea of estoppel. We have urged it to be considered only in the event that we are mistaken as to the force of decisions with reference to the issue of estoppel. In the event that this Court should hold in this case that the plea of estoppel was available to Respondent in the case at bar, then we assert the following proposition:

V.

EVEN IF THE PLEA OF ESTOPPEL WAS AVAILABLE TO RESPONDENT IT WAS FOR THE JURY AND NOT THE COURT TO DETERMINE WHETHER OR NOT RESPONDENT RELIED UPON THE CONDUCT OF PETITIONERS, TO HIS SUBSEQUENT INJURY AND DAMAGE.

Respondent pleaded that Petitioners were estopped from setting up the terms of the initial bill of lading which provided that suit for loss or damage should be instituted within six months after the loss or damage occurred, else same would be barred, for the reason that when the shipment reached El Paso, Texas, from Watrous, New Mexico, and was delivered to Petitioners by the initial carrier, the Santa Fe Railway Company, the Petitioners refused to carry the shipment under the initial contract and

required Respondent to enter into new contracts with each of them.

This was in effect a plea of "estoppel in pais." The trial Court assumed as a matter of law that said plead of estoppel was good, and submitted to the jury the questions of negligence involved in the case. Petitioners objected to the action of the Court in assuming that the plea of estoppel was good as a matter of law instead of the Court submitting the question for the determination of the jury. In their bill of exceptions to the charge of the Court, Petitioners asserted:

"The Court's charge is erroneous because it assumes that the initial contract, which these defendants pleaded, and which was executed at Watrous, New Mexico, covering the shipment from that point to Waco, Texas, was either invalid, or that the provisions of same that the defendants pleaded were invalid, or had been waived, for the reason that said contract and certain of its provisions have been pleaded by these defendants and the Court is not authorized in assuming as a matter of law that the contract is void or illegal, or certain of its provisions are void or illegal, or had been waived, for the reason that said facts are questions for the jury to determine and not for the Court, and defendants object to the submission of said charge in the manner framed, for the reasons herein set out, same were prejudicial to these defendants." (Tr. p. 84, Sec. 164.)

It is the contention of Petitioners that if the sub-

sequent contracts were not illegal and void as has been argued heretofore, then it was a matter for the jury to determine whether or not Respondent relied upon the action and conduct of Petitioners to his consequent injury and damage; and the trial Court should not have assumed such to be a fact.

In Vol. V, page 945, of the Encyclopedia of United States Supreme Court Reports, published by the Michie Company, under Section 5, the rule is stated:

"No estoppel in 'pais can be created, except by conduct which the person setting up the estoppel has the right to rely upon, and does in fact rely upon and act upon.' "

In support of this proposition there is cited the case of *Wiser vs. Lawler*, 189 U. S. 260, 47 Ed. 802, and many others by the same Court. In referring to the *Wiser vs. Lawler* case, *supra*, we find this language of Mr. Justice Brown:

"So, too, to constitute an estoppel, either by express representation or by silence, there must not only be a duty to speak, but the purchase must have been made in reliance upon the conduct of the party sought to be estopped."

This is an elementary proposition of law in the Doctrine of Estoppel.

However, we cite a few cases of different States upon same:

"In a suit to recover land, defendants were not estopped to assert that they had not conveyed the land, by establishment of lines and plats, where the purchase was not made in reliance thereon."
(Texas) *Ware vs. Perkins*, 178 S. W. 846.

"There is no estoppel unless the person claiming it relies on the conduct." (Vermont) *Stevens vs. Blood*, 96 Atlantic 697.

"To constitute estoppel the person asserting it must have been induced by the acts set up to do the things he did." (Oklahoma) *Williamson vs. King*, 158 Pacific 1142.

"An adjoining landowner held not estopped to claim damages from defendants filling up a ravine crossing the street, though he was defendant's foreman in the work; the elements of reliance by defendant on his acts and conduct being lacking." (Michigan) *Weller vs. Harrison Land Co.*, 161 N. W. 894.

Respondent alleged that Petitioners refused to carry the shipment under the initial contract; and required him to sign new contracts with each of them. The question now arises: "Did Respondent rely upon the assertion of Petitioners that they would not carry his shipment under the terms of the initial contract." Respondent was charged with notice as a matter of law that under the Carmack Amendment, Petitioners were the agents of the initial carrier, the Santa Fe Railway Company, and were required by the laws of the United States to carry his shipment under the initial contract. This being true, how could the Trial Judge hold as a matter of law that Respondent relied upon the conduct and representations of Petitioners, when, at best, the question is one of fact for the jury to pass upon? If this issue had been submitted to the jury, and the said jury had been instructed that Respond-

ent was charged with knowledge, as a matter of law, that Petitioners were agents of the initial carrier, and were required by the laws of the United States to carry the shipment under the initial contract, the jury could have determined that Respondent did not rely upon the refusal of petitioners to carry the shipment upon the initial contract, but that Respondent voluntarily entered into the subsequent contracts with the Petitioners putting no reliance upon their statements that they would not carry the shipment under the initial contract, as they were by law, required to do.

Petitioners were deprived of a right and privilege arising from the terms of the initial contract, issued pursuant to the laws of the United States, by the action of the trial Court in arbitrarily holding that they were estopped from setting up the terms of the initial contract when as a matter of truth and fact, the question, at best, was one for the jury to pass upon.

CONCLUSION.

Petitioners pleaded in the trial court their defense to Respondent's cause of action, the failure of Respondent to bring his suit for loss and damage on his shipment of horses from Watrous, New Mexico, to Waco, Texas, within six months, as specified in the original bill of lading issued by the Santa Fe lines at Watrous, New Mexico, and signed by Respondent. (Tr. pp. 11-12, Par. 6.) The undisputed evidence shows that the shipment of horses was made by Respondent about the 9th of October, 1913, from Watrous, New Mexico (Tr. p. 131, Sec. 257), and that the shipment of horses was delivered at Waco,

Texas, at Bell Mead Yards, by the Missouri, Kansas & Texas Railway of Texas, on October 15, 1913. (Tr. p. 155, Sec. 302.) The undisputed evidence shows that the injury to Respondent's horses occurred prior to delivery at Waco, Texas, on October 15, 1913. (Tr. pp. 131-133.) Respondent filed his suit for loss and damages on said shipment, on March 2, 1915, more than sixteen months after the loss and damage occurred. (Tr. p. 1.) At the close of the evidence, Petitioners asked the Court to instruct the jury to return a verdict in their favor because of Respondent's failure to file his suit within six months after the accrual of the damages, which instruction was refused by the Court. (Tr. pp. 28-29.) Petitioners reserved their exception to the refusal of the Court to instruct the jury to return a verdict in their favor (Tr. pp. 85-88), and in their motion for a new trial, which under the Texas practice consisted of their assignments of error, in paragraphs 7, 8, and 9 thereof, reserved the point that the trial Court committed error in refusing to peremptorily instruct the jury to return a verdict in their favor. (Tr. p. 45.) This point was briefed and presented to the Court of Civil Appeals for the Second Supreme Judicial District of Texas, at Fort Worth, Texas, which Court affirmed the judgment of the trial Court, and petitioners thereupon filed their motion for rehearing, in which they asserted that the Court of Civil Appeals erred in not holding that the trial Court should have granted Petitioners' special charge asking for peremptory instruction. (Tr. p. 161.) The Court of Civil Appeals entered an order overruling Petitioners' motion for rehearing (Tr. p. 209), and Petitioners presented the same point in their petition for writ of certiorari on file in this

court, which said petition was granted as hereinbefore set out.

Petitioners having urged their defense in the trial court, and having reserved the point in the Court of Civil Appeals under the decisions that we have hereinbefore set out, we respectfully urge that it is the duty of this Court to reverse the judgment of the Court of Civil Appeals for the Second Supreme Judicial District of Texas at Fort Worth, Texas, and to remand this case to said Court, with instructions to render judgment for Petitioners.

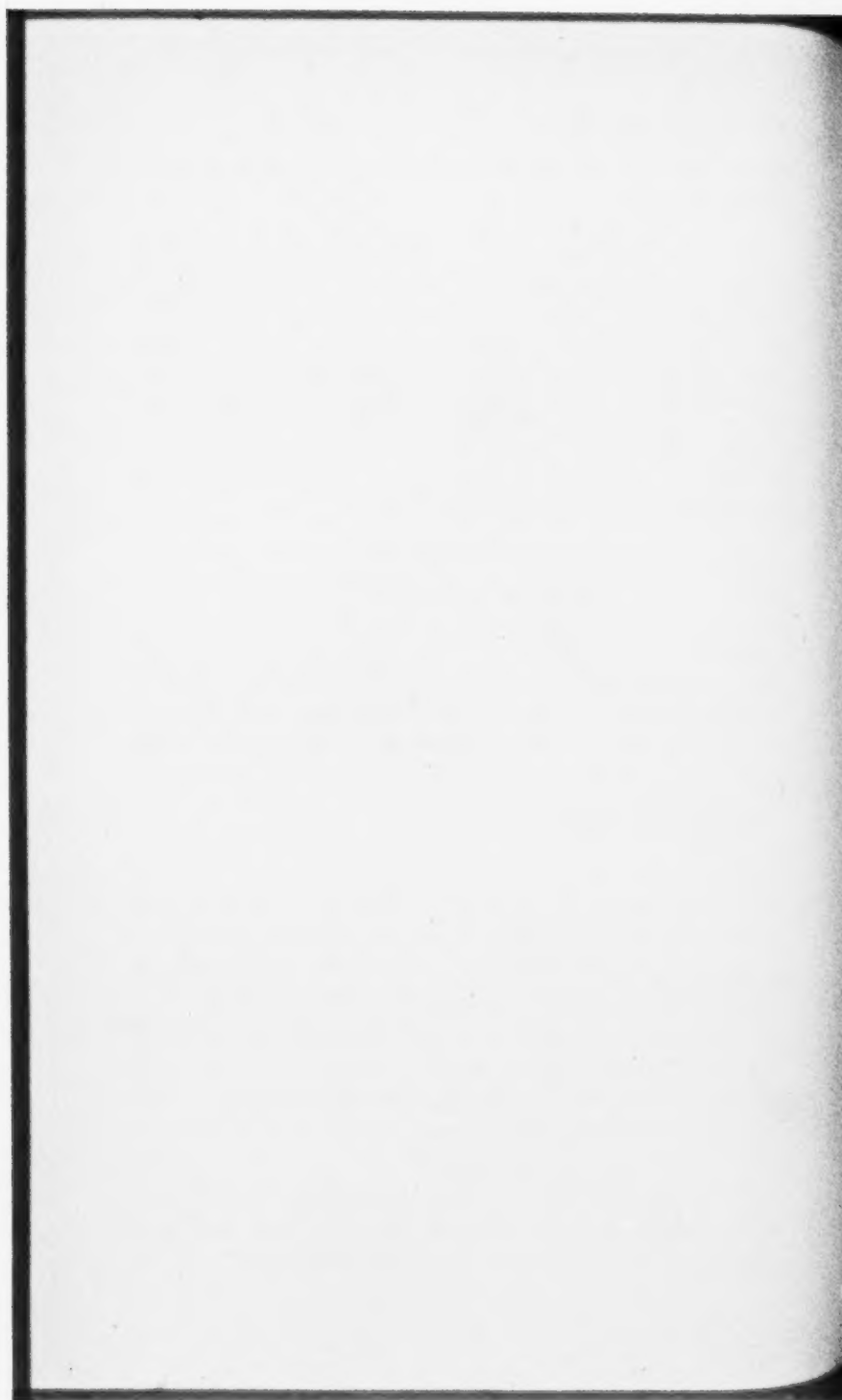
Respectfully submitted,

GEORGE THOMPSON,

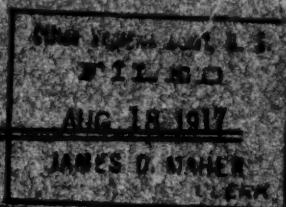
J. H. BARWISE, JR.,

*Attorneys for Petitioners, Texas
& Pacific Ailway, and Mis-
souri, Kansas & Texas Railway
of Texas.*

November, 1918.



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No. **629** **249**

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1917.

TEXAS & PACIFIC RAILWAY COMPANY
and
MISSOURI, KANSAS AND TEXAS RAILWAY
COMPANY, OF TEXAS,
Petitioners,

vs.

B. LEATHERWOOD,
Respondent.

BRIEF FOR RESPONDENTS.

TEMPLETON & MILAM,
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Of Counsel.

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Respondent.

BRIEF FOR RESPONDENTS.

In reply to Petitioners' application for a writ of certiorari and their brief in support thereof, we submit the following propositions and brief of argument for Respondent, to-wit:

PROPOSITION.

The questions at issue as disclosed by the record in this case do not involve the validity or construction of any Statute of the United States or of the State of Texas, or any authority exercised thereunder. Neither do they

involve the validity of any provision of the contract of shipment issued by the initial carrier and which was held invalid by the State Courts. On the contrary, the questions presented by the record are:

First: Were the petitioners estopped from claiming the benefits of the period of limitation provided for in the contract of the initial carrier; by reason of their refusal to receive and transport the stock under that contract; and by requiring the execution of the new contracts, or stock, to execute new contracts providing for different and longer periods of limitation, under which contracts the stock were in fact transported over the petitioners' respective lines of railway.

Second: Was such provision of the initial contract waived by the actions and conduct of the petitioners, (1) in so refusing to receive and transport the stock under the terms of the contract made with the initial carrier, and by requiring the execution of the new contracts, or (2) in receiving the plaintiff's claim for damages and holding it under investigation until the six months period had elapsed before notifying the plaintiff that the claim was rejected.

Third: Did the petitioners waive that part of the written contract requiring the shipper to unload, feed and water the stock while in transit, by themselves assuming such duty? Neither of these questions presents such a federal question as will give this court jurisdiction.

STATEMENT.

On the trial of the case in the court below, it was agreed as follows, to-wit:

AGREEMENT.

"Counsel for defendant T. & P. Railway Company and M. K. & T. Ry. Co. of Texas agreed that when plaintiff's horses reached El Paso and were delivered to the T. & P. Ry. Co. to be carried on to the final destination, Waco, that the T. & P. Ry. Co. refused to carry the shipment under the original Santa Fe contract executed at Watrous, N. M. and covering the through carriage from Watrous, N. M. to Waco, Texas, but required the execution of a T. & P. contract covering the carriage of the shipment from El Paso to Waco, Texas, which was executed by shipper's agent who signed the T. & P. Ry. Co. contract at El Paso, likewise when the shipment reached Fort Worth, Texas, the M. K. & T. Ry. Co. of Texas refused to carry the shipment under the original Santa Fe contract referred to, or the T. & P. contract referred to, but required the execution of a M. K. & T. Ry. Co. of Texas contract covering the carriage of the shipment from Fort Worth to Waco, Texas, which was executed by shipper's agent who signed the M. K. & T. Ry. Co. of Texas contract at Fort Worth." (S. F. p. 40).

One provision of the Texas and Pacific contract under which the stock moved from El Paso to Fort Worth as set out in plaintiff's plea of estoppel, was as follows, viz:

"Seventh: It is further agreed that no suit or action against the Company for the recovery of any damages accruing or arising out of said shipment or any contract pertaining to same, or the furnishing facilities for such shipment shall be sustained in any court of law or equity unless such suit or action shall be commenced within two

years next after the cause of action shall have accrued." (Tr. pp. 43-44).

It was pleaded and proven by the plaintiff that on December 6th, 1913, after the shipment was made in October of that year, he presented his claim for damages in writing as required by one of the stipulations of the initial contract, to A. G. Hood, the agent of the initial carrier at Watrous, New Mexico, where the shipment originated. This claim was transmitted successively to the claim departments of the several carriers handling the shipment. They each in turn investigated the claim and finally rejected it on the 29th day of May, 1914, after the six months period of limitation stipulated for in the contract had expired. This action by the carriers was duly pleaded by the plaintiff as a waiver of that stipulation, and as rendering the enforcement thereof unreasonable. (Tr. pp. 40-42). The retention and rejection of the claim as plead was proven by testimony that was undisputed. See testimony of B. Leatherwood, Statement of Facts, pp. 34 and 35.

F. S. Brooks, Ib. 36, 37, 38.

S. J. Baird, Ib. 38, 39, 40.

It was proven by one of the defendants' witnesses that when the stock reached Big Springs, which was a feeding station between El Paso and Ft. Worth, the defendant Texas and Pacific Railway Company unloaded, watered and fed them and held them there in the feeding pens for some twenty-four hours. See testimony of M. H. Williamson, Statement of Facts, pp. 62, 63.

ARGUMENT.

The first and second questions presented by the petition for certiorari, present for decision the following

questions, to-wit: (1) Can any of the succeeding carriers of an interstate shipment by their wrongful action or conduct in refusing to receive and carry the freight under the terms of the contract made with the initial carrier, and by requiring the execution of new contracts under which the freight is moved over their lines estop themselves from thereafter claiming the benefits of a provision of the initial contract requiring suit to be instituted within six months next after the loss or damage shall have occurred; and this when their own contracts which they forced the shipper to execute, has fixed such period of limitation at two years? (2) Can such a provision in the initial contract be waived by any action or conduct on the part of any of the carriers, or must it be complied with by the shipper as a condition precedent to his recovery, notwithstanding any act or conduct on the part of the carrier? Petitioners contend, if we understand them correctly, that there can be no such estoppel or waiver, and that the provisions of the initial contract must be complied with before any recovery can be had by the shipper. This contention if we understand it correctly, is predicated on the proposition that once the initial contract is signed by the shipper, each and all of its provisions and conditions become a part of the rate, or at least so interconnected therewith, that all such provisions become irrevocable and have all the force and effect of a statute or order of the Interstate Commerce Commission; the disregard whereof will amount to such discrimination as is prohibited by the interstate commerce act and is hence, illegal. Wherefore it is contended that no estoppel or waiver can arise however gross the misconduct of the carriers may be, and this without regard to the injury thereby inflicted on the shippers.

Numerous authorities are cited by petitioners which they insist sustains the affirmative of this proposition. We deny the proposition and insist that rightly understood the authorities cited do not sustain it.

In the first place we deny that the stipulation of the initial contract requiring an action to be brought within such a limited period of time after the loss or damage occurred is so connected with the rate or is of such a character that its disregard or waiver will amount to discrimination such as is prohibited by the statute. Clearly the provision in question pertains to the remedy only; and clearly the provision to be valid must be reasonable, not only when the contract is made, but also as applied to the circumstances thereafter arising. The rate was charged and paid at the time the shipment was made. The stipulation was to operate in the future and must be reasonable as applied to the facts thereafter arising, and existing at the time the stipulation was sought to be enforced.

What those facts would be could not be definitely foretold, and what the circumstances would be could not be certainly foreseen. Hence the reasonableness or no, of the stipulation could not be determined until the facts and circumstances occurred and became known. As applied to one state of facts such a stipulation might be altogether reasonable and as applied to another might be unreasonable. Whether it be reasonable or unreasonable in the particular case must be determined by the trial court, not as a question of law, but as a question of fact. Such a question of fact cannot be reviewed by this court. The question of the power and authority of the carrier to waive compliance on the part of the shipper with such provisions of the contract has been decided adversely to petitioners' contention by

state courts in a number of cases. The Court of Appeals of Kentucky has uniformly held that such stipulation can be waived by the carrier.

Cincinnati etc. Ry. Co. vs. Smith and Johnson, 176 S. W. 1015, 1016.

In this case the shipments were interstate. The contracts contained a provision denying the shipper a right to recover unless claim for damages were made within five days. Failure to claim within the time stipulated was pleaded in bar of the action. The contract further provided that the shipper would not hold the carrier liable for any delay occasioned by stress of weather not due to negligence, etc. These defenses were pleaded by the defendants after the case had been once tried and appealed and the judgment had been rendered. The plaintiff replied to the plea setting up these defenses; that they had been waived by failure to plead them in the original answer. Upon the question thus presented the Court of Appeals of Kentucky said: "We are of the opinion that appellant clearly waived its right to plead the five days notice clause, and as will be seen the rejection of this plea about the weather was not prejudicial. While these were interstate shipments and therefore regulated by the federal law, the subjects referred to are not directly within the scope of the interstate commerce act. That act regulates charges, fares and rates and permits them to be based upon valuation of the article shipped, but it makes no provision on the subject of notice of claim for damages, nor does it afford relief on account of weather conditions. These are under the common law, matters of defense, but they are subject to waiver."

A similar ruling involving the same question of law

was made by the same court in the case of B. & O. Ry. Co. vs. Leach, decided January 26, 1917, 191 S. W. 310-314. In this case many of the authorities cited and relied on by petitioners, were reviewed and were held not to have decided the point at issue. The same ruling was made by the same court in Howard vs. Calahan, 171 S. W. 442-447. In this case the authorities bearing on the question were reviewed at length and the conclusion was reached that such provisions in such contracts could be waived. A similar ruling was made by the Court of Civil Appeals of the Seventh District of Texas in re Railway Co. vs. Scott, 156 S. W. 196, wherein the court held that the carriers could waive all such provisions of the contract. The same ruling was made by the same court in the case of Railway Co. vs. Linger, 156 S. W. 298-300. Also in re Railway Co. vs. Wall, 165 S. W. 527-528. Numerous other cases to the same effect might be cited, but the foregoing are sufficient to present our view. Do the authorities cited by petitioners support their contention? It is true that in some of these cases this Honorable court in deciding the issues there presented, used language indicating that such provisions of such contracts could not be waived. But in none of these cases was the question here at issue involved. Here the issue is one of estoppel. The authorities hold almost without dissent that any party to a contract may by his acts or conduct estop himself from claiming the enforcement of such provisions of his contract as are inserted therein for his own benefit and protection. He may even estop himself from asserting rights guaranteed to him by a statute or the constitution. See Ruling Case Law, Vol. 10, Secs. 19, 20, pp. 688 to 692 and Sec. 140, pp. 836, 837.

8 Cyc. 791-792 and authorities there cited.

Young vs. City of Colorado, 174 S. W. 986-994.

Of course no estoppel will be permitted to operate when it would result in nullifying some provision of the interstate commerce act or some positive requirement of the law. But is such the case in the present instance? We deny it. As was said by the Court of Appeals of Kentucky in the case of Cincinnati etc. Ry. Co. vs. Smith and Johnson cited above "The subjects referred to are not directly within the scope of the interstate commerce act. That act regulates charges, fares and rates and permits them to be based on the valuation of the article shipped, but it makes no provision on the subject of notice of claim for damages, nor does it afford relief on account of weather conditions. These are the common law matters of defense but they are subject to waiver." 176 S. W. 1016. To the same effect is the reasoning of the same court in re B. & O. Ry. Co. vs. Leach, 191 S. W. 310-314. In this case, the court after citing and reviewing numerous decisions of the court, among them the case of Georgia F. & A. Railway Co. vs. Blish Milling Co., said: "The effect of a direct waiver of such a condition (requiring notice of loss or damage to be given within a specific time) by the party in interest and by his agreement was not before, nor considered by the court." The court after noticing the case of Chesapeake and Ohio Railway Co. vs. McLaughlin 242 U. S. 142, said: "It seems that the rule there declared, was that such a stipulation in a contract was valid and binding on the shipper unless there was something in the record showing circumstances which rendered it invalid or to excuse failure to comply with it." The same observations will apply to the decision of this court rendered in the case of M. K. & T. Ry. Co. vs. Ward cited and so confidently relied on by petitioners. In that case the plaintiff in error who was

an intermediate carrier, set up as a defense to the action brought by the shipper the failure of the latter to give notice of his damages as required by a provision of the contract which it had required the shipper to make and which he executed under protest. No such stipulation was contained in the contract made with the initial carrier. He disputed the validity of the second contract and his contention was upheld by the state courts and this holding was affirmed by this court. The language used by the court which is quoted by petitioners, has reference to the issue thus presented for decision. The issue of estoppel was not involved in the case, and the same thing is true of the other cases cited by petitioners.

In all these cases where a second contract was executed by the intermediate carriers, that carrier was seeking to enforce that contract and the shipper was resisting its enforcement on the ground that he executed it under duress and without consideration. Clearly in such cases no estoppel could arise. In the other cases cited the shippers sought to excuse their failure to comply with the provisions of the contract made with the initial carriers, under which the freight moved on the ground that the stipulation in such contract, with which they had failed to comply, was either unreasonable, or that it had been waived by the carrier. Again no such issue of estoppel as is presented in the present case was raised or decided. In the instant case the shipper is not seeking to secure by estoppel the enforcement of an illegal contract, i.e., one prohibited by some provision of the law or by an order of the Interstate Commerce Commission. Nor is he seeking to prevent the enforcement of some provision of the interstate commerce act or some order of the commission. But what

he is seeking to do is to prevent the petitioners from taking advantage of their own wrongful act in refusing to recognize the contract of the initial carriers and in requiring him to accept the new contracts which they exacted from him, and upon which he was induced to rely and act to his hurt: And this too in a matter relating solely to his remedy. To permit such wrongdoers to take advantage of their own wrongs, to their own gain, and to the loss of the shipper is so unconscionable as to be clearly against public policy.

In all of the cases, the bills of lading issued by the carriers are treated as contracts and the shipper is held bound thereby on the principles of estoppel. *M. K. & T. Ry. Co. vs. Harriman*, 227 U. S. 657. 57 L. 690. *W. U. Tel. Co. vs. Piper*, 194 S. W. 817-826. In this case the court said: "The theory of the decisions of the federal courts upholding the right of a carrier to limit its liability in certain cases is based on the doctrine of estoppel and not on any supposed right to contract against its own negligence." If the shipper can be estopped by the execution of such a contract, why cannot the carriers be estopped by refusing to recognize the contract made with the initial carrier and requiring the execution by the shipper of new contracts under which the stock are carried to their destination. We insist that the principles of estoppel apply in the one case as in the other.

Petitioners insist in their brief that they were deprived of a valuable right by the refusal of the trial court to submit this plea of estoppel to the jury. Replying to this contention, we submit,

1. That if the petitioners could be estopped at all, the facts as agreed to in the trial court established the estoppel.

2. Whether the evidence did or did not sustain such plea was a question of fact which was determined by the state courts adversely to petitioners.

3. This court will not attempt to review a question of fact which has been determined by the state courts. Nor will it pass on the sufficiency of the evidence to sustain the judgment rendered by the state courts.

Dower vs. Richards, 151 U. S. 658, 38 L. 305 to 310.

Waters Pierce Oil Co. vs. Tex., 212 U. S. 86, 53 L. 417.

In reply to petitioners' contention that they were denied the benefits of that provision of the shipping contracts requiring the plaintiff to unload, feed and water the stock while in transit; we submit that the record does not bear out this contention. The provisions in question were substantially the same in all of the contracts. The record discloses that the horses were sufficiently fed and watered while in the custody of the Texas and Pacific Railway Company, and that the issue as to negligence of that company in failing to properly feed and water the stock while in the custody, was eliminated by the refusal of the trial court to submit such issue to the jury. The undisputed evidence shows that when the stock reached Big Springs, which was a feeding station about half way between El Paso and Fort Worth, the Texas and Pacific Company assumed and discharged the duty of unloading, feeding and watering them and there is no complaint that they were not properly fed and watered there. See testimony of M. H. Williamson, Statement of Facts pp. 62-63. That company only had the stock in their custody after they were reloaded at Big Springs and before they were delivered to the Missouri, Kansas and Texas Railway Company of Texas at Fort

Worth, about twenty hours and there was no complaint that during this time they suffered for feed and water. Statement of Facts, pp. 69, 70. Upon this statement of the evidence, the court declined to submit the issue at all to the jury, as between the plaintiff and that defendant and it was thus withdrawn from their consideration so far as that defendant was concerned. After the stock were delivered to the Missouri, Kansas and Texas Railway Company of Texas at Fort Worth, that company held them confined in the cars without rest, feed or water for an additional period of more than twenty hours; during which time they were transported to their final destination, a distance of between eighty and ninety miles from Fort Worth. The issue of negligence on the part of that company in thus keeping the stock confined in the cars without rest, feed or water for more than twenty-eight hours after they left Big Springs, was submitted to the jury. By their fifth and sixth assignments of error the appellants complained of the refusal of the trial court to submit to the jury special charges 5 and 6 requested by the Texas and Pacific Railway Company to the effect that it was the duty of plaintiff's agent in charge of the stock to unload and feed and water them while enroute from El Paso to Fort Worth provided the necessary facilities for so doing were provided by the company. The refusal of these charges was complained of by that company. See Appellants' brief filed in the Court of Civil Appeals, pp. 49 to 72, and see Appellee's reply thereto in their brief, pp. 28 to 32.

No such charges were requested by the Missouri, Kansas and Texas Railway Company of Texas, and that issue was not submitted nor was its submission requested so far as

that company was concerned. The objections made by that company to the court's charge do not cover the point in question. See pages 95 to 106 of appellee's brief filed in the same court. It thus appears from the record that the petitioners were not deprived of the benefits of that provision of their contracts and that the state courts did not hold same to be either invalid or inapplicable to the shipment.

ARGUMENT.

It having been made to appear by the undisputed evidence that the stock were properly fed and watered by the Texas and Pacific Railway Company between El Paso and Fort Worth, the trial court properly declined to submit an issue which the evidence had eliminated from the case *M. K. & T. Ry. Co. of Texas vs. Canada*, 82 S. W. 1069. Where the railway company in charge of stock assumes the duty of unloading, feeding and watering same while in transit, it relieves the shipper of that duty notwithstanding the contract requires him to do this. *C. R. I. & G. Ry. Co. vs. Linger*, 156 S. W. 298. Same company vs. *Scott*, 156 S. W. 296.

Mo. Pac. Ry. Co. vs. Kingsbury, 25 S. W. 322.

Mex. Natl. Ry. Co. vs. Savage, 41 S. W. 663.

San Antonio etc. Ry. Co. vs. Dolen, 85 S. W. 302.

C. R. I. & G. Ry. Co. vs. Pavilard, 187 S. W. 999, 1000.

As the point we are considering was not raised by the *M. K. & T. Ry. Co. of Texas* either in the trial court or in the Court of Civil Appeals, that company is in no position to complain of the failure of the court to submit the issue to the jury.

We therefore submit that the second federal question presented in the petition for certiorari is without merit. Respondent respectfully submits that the petition for certiorari should be in all things denied or if granted that the judgment of the trial court and of the Court of Civil Appeals should be in all things affirmed and we so pray.

If this Honorable Court should overrule our contention and sustain that of Appellants' and reverse the judgments of the State Courts we would in such event call the attention of the court to what we deem to be an abuse by petitioners of the rules of both the state courts and of this court which has resulted in needless expense and unnecessary cost which we insist should in any event be taxed against the petitioners.

The amount sued for by the plaintiff was \$520.00, with interest and costs. (Tr. p. 16). The issues involved were not complicated. Barring the single issue raised by the defendants' plea in bar of the action as stipulated in the contract of the initial carrier, every issue raised on this appeal relates to mere matters of procedure in the trial court. Appellants began the fight by presenting four pages of exceptions to the plaintiff's petition. (Tr. pp. 17 to 20). They requested ten special charges which cover fifteen pages of the transcript. (Tr. pp. 55 to 70). Then only three of these charges, Nos. 1, 5 and 6, are made the basis of assignments of error in the brief. All others are abandoned. Their amended motion for a new trial contains fifty-six grounds covering thirty-eight pages of the transcript (Tr. pp. 81 to 119). They reserved twenty-one bills of exceptions covering ninety-four pages of the transcript. (Tr. pp. 125 to 219). Their bill No. six, which covers twenty-five pages of the transcript is made up of numerous objec-

tions and arguments, often reiterated and duplicated, to the court's charge. (Tr. pp. 140 to 166). Their bills of exceptions to the refusal of their special charges are all made up in the same way, and contain long drawn out arguments and statements often repeated; with the charges referred to copied at length. (Tr. pp. 167 to 199).

Most of the alleged errors covered by the bills of exception are abandoned in the brief. Yet the bills are all copied in the record. When the jury returned their verdict it was informal, and the defendants sought by every means in their power to prevent its correction and to have a mistrial declared and failing in this, they reserved two long bills of exception to the action of the court in correcting and receiving the verdict. (Tr. pp. 207 to 217). No assignment complains of this action of the trial court. In short, practically every ruling which the trial court made in the case was objected to, and voluminous bills of exception were reserved thereto, all of which were copied at length in the record.

In making up the transcript they have needlessly included the plaintiff's original petition and their original answers thereto, all of which pleadings were superseded by amendments on which the trial was had. (Tr. pp. 2 to 8 and 10 to 29). They have also needlessly included the original and amended answers of the Santa Fe companies. (Tr. pp. 9 and 30 to 39). The result of the disregard of the rules, is a transcript of 223 pages for the making of which the County Clerk's fees are \$75.00. The total court costs as shown by the transcript amounts to \$195.85 which with the costs of the appellate courts added will amount to approximately the amount of the judgment appealed from and possibly more. (Tr. p. 224). Appellants then filed in

the Court of Civil Appeals a brief, so-called, of 121 printed pages, necessitating an extended reply thereto. All of this in a little county court case wherein the judgment rendered is for only \$336.30.

In bringing the case to this court petitioners have had prepared and filed with their petition and brief, a full and complete copy of the entire transcript and statement of facts filed in the Court of Civil Appeals, thus again duplicating the record of the entire proceedings both in the trial court and the Court of Civil Appeals; the major portion whereof pertains to mere matters of practice and procedure in the state courts and which are wholly foreign to the issue presented for the consideration of this court. The unnecessary cost which has been thus incurred by petitioners appears to us to be wholly unjustified and unwarranted; and we submit that such excessive costs should be in any event taxed against petitioners and we so pray. That this may and frequently is done under the Texas practice, see

Wall vs. Melton, 94 S. W. 358.

M. K. & T. Ry. Co. vs. Williams, 96 S. W. 1087, 1089.

P. & N. T. Ry. Co. vs. Porter, 158 S. W. 564.

Wynn vs. Land Co., 150 S. W. 310.

Tucker Produce Co. vs. Stringer, 146 S. W. 1001.

Baum vs. McAfee, 125 S. W. 984.

Chaison vs. McFaddin, 132 S. W. 524.

Wallace and Reed vs. Reed Bros., 117 S. W. 1019.

See also Rules 8 and 24 of this Court.

Respectfully submitted,

TEMPLETON & MILAM,

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Of Counsel.

**TEXAS & PACIFIC RAILWAY COMPANY ET AL.
v. LEATHERWOOD.**

**CERTIORARI TO THE COURT OF CIVIL APPEALS, SECOND
SUPREME JUDICIAL DISTRICT, OF THE STATE OF TEXAS.**

No. 240. Submitted March 19, 1910.—Decided June 9, 1910.

Under the Carmack Amendment, connecting carriers, by requiring a shipper to sign new bills of lading for a shipment billed over their lines by the initial carrier, are not estopped to avail themselves of a provision of the original bill limiting the time for bringing actions

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for damages, (p. 481), where the new bills were not acquiesced in by the shipper. P. 483.

A stipulation in a bill of lading limiting to six months the time within which the shipper may sue for damages is not unreasonable and, before the Act of March 4, 1915, c. 176, 38 Stat. 1196, was valid under the Carmack Amendment. P. 481.

Where matter clearly not required for a proper presentation of the questions submitted is incorporated into the transcript, the court may, under Rule 8, § 1, require that the whole of the clerk's fees for supervising the printing and the cost of printing the record be borne by the offending party. P. 482.

Reversed.

THE case is stated in the opinion.

Mr. George Thompson and *Mr. J. H. Barwise, Jr.*, for petitioners.

Mr. D. T. Bomar for respondent. *Mr. J. E. Garland* was on the brief.

MR. JUSTICE BRANDEIS announced the judgment of the court, and delivered the following opinion:

Leatherwood made, in 1913, a shipment of horses from Watrous, New Mexico, to Waco, Texas, over four connecting railroads. The initial carrier gave him a through bill of lading which contained a provision barring any action for damages unless suit was brought within six months after the loss occurred. When the horses reached the lines of the Texas & Pacific Railway and of the Missouri, Kansas & Texas Railway, each of these companies insisted, as a condition of carrying them further, that Leatherwood accept and sign a new bill of lading covering the shipment over its line, and he did so.

In 1915 he brought suit in a state court of Texas for injury to the horses while in transit on the lines of those two companies. The bills of lading issued by them did

not contain the provision requiring suit to be brought within six months; but the carriers set up as a defense the provisions to that effect contained in the original bill of lading, contending that under the Carmack Amendment (Act of June 29, 1906, c. 3591, 34 Stat. 584, 595) all connecting carriers were bound by its terms and that the later ones issued by themselves were of no legal effect.¹ The trial court denied this contention, and ruled as matter of law that the carriers could not rely upon the provision in the initial bill of lading. Judgment was entered for the plaintiff and affirmed by the Court of Civil Appeals. On June 2, 1917, that court denied a rehearing and declined to certify to the Supreme Court of Texas the questions involved. The case comes here on writ of certiorari (245 U. S. 649) under § 237 of the Judicial Code, as amended by Act of September 6, 1916, c. 448, 39 Stat. 726.

The final decision below was rendered two days before the decision of this court in *Missouri, Kansas & Texas Ry. Co. v. Ward*, 244 U. S. 383. There one of the same railroads had, as connecting carrier, issued a second bill of lading to shippers of live stock who had received from the initial carriers a through bill of lading on an interstate shipment. But there the carriers relied for defense upon a clause in the second bill of lading, which was not contained in the first. We held that the second bill of lading was void, since under the Carmack Amendment the several carriers must be treated, not as independent contracting parties, but as one system; and that the connecting lines become in effect mere agents whose duty it is to forward the goods under the terms of the contract made by their principal, the initial carrier, and that they are prevented

¹ The rights of the parties are not affected by the Act of March 4, 1915, c. 176, 38 Stat. 1196, which prohibits a common carrier from providing by contract or otherwise for a shorter period than two years for the institution of suits.

by law from varying the terms of that contract. Leatherwood contends that the principle upon which the case was decided is not applicable here, because there the carriers sought to avail themselves of the second bill of lading, while here they seek to ignore it; and he insists that the carriers are, by their conduct, estopped from asserting its invalidity. As stated in *Georgia, Florida & Alabama Ry. Co. v. Blish Milling Co.*, 241 U. S. 190, 197, the parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper a right to ignore them. "A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all affected must take notice. That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled. A carrier has, for instance, been permitted to collect the legal rate, although it had quoted a lower rate and the shipper was ignorant of the fact that it was not the legal rate. *Texas & Pacific Ry. Co. v. Mugg*, 202 U. S. 242; *Illinois Central R. R. Co. v. Henderson Elevator Co.*, 226 U. S. 441; *Louisville & Nashville R. R. Co. v. Maxwell*, 237 U. S. 94; *Missouri, Kansas & Texas Ry. Co. of Texas v. Schnoutz*, 245 U. S. 641 (*Per curiam*).

The provision in the original bill of lading limiting to six months the time within which suit may be brought, not being unreasonable (*Missouri, Kansas & Texas Ry. Co. v. Harriman*, 227 U. S. 657, 672-673), was valid; and as the original bill of lading remained binding, the lower

courts erred in denying it effect. The judgment of the Court of Civil Appeals must therefore be reversed.

The record occupies 213 printed pages. Most of the matter which was included in it at the instance of petitioners was clearly not required for a proper presentation of the questions submitted here. Much useless expense has been incurred; and both court and counsel have been subjected to the burden of examining much that is irrelevant. Section 1 of Rule 8 of this court specifically provides that if portions of the record unnecessary to a proper presentation of the case are found to have been incorporated into the transcript by either party, the court may order that the whole or any part of the clerk's fees for supervising the printing and the cost of printing the record be paid by the offending party. Under the circumstances of this case it seems appropriate that the whole of this expense be borne by the petitioners; and it is so ordered.

Judgment reversed.

I am authorized to say that THE CHIEF JUSTICE, MR. JUSTICE HOLMES, and MR. JUSTICE DAY concur in the above opinion.

MR. JUSTICE McKENNA, MR. JUSTICE PITNEY, and MR. JUSTICE CLARKE dissent.

MR. JUSTICE McREYNOLDS concurring.

I concur in the conclusion that the judgment below must be reversed. Circumstances disclosed by the record and not discussed in the opinion, I think, require this result. But the broad declaration that the parties to a bill of lading cannot waive its terms nor can the carrier, by its conduct, give the shipper the right to ignore them goes beyond what is necessary to the decision and I am not prepared to assent to it as a proposition of law.

Suit was originally brought against the initial line (The Santa Fe) and connecting ones—Texas & Pacific Ry. Co. and Missouri, Kansas & Texas Railway—the claim being based upon the implied obligation arising out of delivery and acceptance of the horses by the former for through interstate carriage. In his pleadings the shipper expressly denied validity of all bills of lading—one issued by the Santa Fe and one by each of the petitioners. Of course, under the rule approved in *Missouri, Kansas & Texas Ry. Co. v. Ward*, 244 U. S. 383, he could have relied upon the first bill; but it does not follow that if, during transit, a connecting carrier declined to recognize the original agreement for through transportation and refused to proceed thereunder, he had no power to acquiesce, take possession of the animals and re-ship under another contract with such carrier not subject to avoidance by it. And if, in the present cause, instead of repudiating the bills of lading issued by connecting roads he had relied upon them the question presented would be a very different one, decision of which is not now demanded.

MR. JUSTICE VAN DEVANTER joins in this opinion.
